Supreme Court, U.S.
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No. 99-667

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ERIC LEPPO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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QUESTIONS PRESENTED FOR REVIEW.

What state of mind must the government prove in order to sustain its burden of proving beyond a reasonable doubt that a defendant *willfully caused* the interstate transportation of stolen goods, in violation of 18 U.S.C. § 2314 and 18 U.S.C. § 2(b), and was the evidence sufficient to show beyond a reasonable doubt that the defendant in this case satisfied that standard of proof, where it was stipulated that the defendant sold and delivered the stolen goods in Massachusetts, having no interest in the ultimate destination of the goods, but expecting that the innocent purchaser would transport the goods to its place of business in Connecticut.

TABLE OF CONTENTS.

Question Presented for Review i

Table of Authorities iii

Opinions and Ordered Entered Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 2

Statement of the Case 3

Argument 8

Introduction 8

a. The genesis of 18 U.S.C. § 2134 and 18 U.S.C. § 2(b) 9

b. Section 2(b) is an important federal criminal statute that applies to virtually every criminal prosecution, various circuits have completely ignored the clear Congressional intent that a conviction under § 2314 in reliance upon § 2(b) requires "willful causation", and a split exists among several circuits regarding the state of mind necessary in order to convict an individual under these statutory provisions 10

c. Synopsis: Respectfully, this Court should grant the defendant's petition, the Court should articulate the proper evidentiary standard to be utilized to determine whether a defendant has "willfully cause" another to transport stolen goods in interstate commerce, and the Court should remand the case at bar to the district court so that the trier of fact can analyze the evidence in this case in light of the newly enunciated standard of proof 17

Conclusion 20

Appendix ..... *follows conclusion*

TABLE OF AUTHORITIES.

CASES:

Bates v. United States,
522 U.S. ___, ___, 118 S.Ct. 285 (1997) 19

Dowling v. United States,
473 U.S. 207 (1985) 19

Hohn v. United States,
___ U.S. ___, 118 S.Ct. 1969 (1998) 18

Pereira v. United States,
347 U.S. 1 (1954) 12, 13, 15, 19

Lawrence v. United States,
357 F.2d 434 (10th Cir.1996) 11n

United States v. Andrade,
135 F.3d 104 (1st Cir.1998) 16

United States v. Berlin,
472 F.2d 13 (9th Cir.1973) 16, 18

United States v. Cowden,
545 F.2d 357 (1st Cir.1973) 16

United States v. Duke,
409 F.2d 669 (4th Cir.1969) 11n

United States v. Forsythe,
560 F.2d 1127 (3d Cir.1977) 11n

United States v. Gordon,
812 F.2d 965 (5th Cir.1987) 11n

United States v. Lack,
129 F.3d 403 (7th Cir.1997) 15

United States v. Lennon,
751 F.2d 737 (5th Cir.1985) 11, 12, 14, 15

United States v. Leppo,
177 F.3d 93 (1st Cir.1999) ..... *passim*

United States v. Lester,
363 F.2d 68 (6th Cir.1966) 11n

United States v. Ludwig,
523 F.2d 705 (8th Cir.1975) 13, 14, 15, 17, 18

United States v. Martin,
747 F.2d 1404 (11th Cir.1984) 11n

United States v. Moya-Gomez,
860 F.2d 706 (7th Cir.1988) 11n

United States v. Newson,
531 F.2d 979 (10th Cir.1976) 14, 18

United States v. Sabatino,
943 F.2d 94 (1st Cir.1991) 11

United States v. Sanchez,
917 F.2d 607 (1st Cir.1990) 11

United States v. Sannicandro,
434 F.2d 321 (9th Cir.1970) 11n

United States v. Scandifia,
390 F.2d 244 (2d Cir.1967),
vacated on other grounds sub nom
Giordano v. United States,
394 U.S. 310 (1969) 15

United States v. Scarborough,
813 F.2d 1244 (D.C. Cir.1987) 13, 14, 17

United States v. Taylor,
464 F.2d 240 (2d Cir.1972) 11n

STATUTES AND RULES:

United States Code

18 U.S.C. § 2(b) ..... *passim*
18 U.S.C. § 415 (1940) 9
18 U.S.C. 2314 ..... *passim*
28 U.S.C.A. § 1254 (West 1999) 2

United States Supreme Court Rules

Rule 10 19

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OPINIONS AND ORDERS ENTERED BELOW.

The opinion of the court of appeals (A. 2a-10a) is reported at 177 F.3d 93 (1st Cir.1999). The order of the district court (A. 11a-25a) is unreported.

STATEMENT OF JURISDICTION.

On March 23, 1998, the Honorable Robert E. Keeton, United States District Court Judge for the District of Massachusetts, found

the defendant guilty of committing four separate violations of 18 U.S.C. § 2314. (A. 11a). On May 27, 1999, the United States Court of Appeals for the First Circuit affirmed the district court's judgment. (A. 2a). On July 20, 1999, the United States Court of Appeals for the First Circuit denied the defendant's Petition for Rehearing. (A. 1a). Section 1254 of Title 28 of the United States Code confers this Court with jurisdiction to review on a writ of certiorari the judgment or order in question in this case. 28 U.S.C.A. § 1254 (West 1999) ("[c]ases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree"). (A. 79a).

STATUTORY PROVISIONS INVOLVED.

The pertinent portion of section 2314 of Title 18 of the United States Code states:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

Section 2(b) of Title 18 of the United States Code states:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE.

This Petition arises from judgments of conviction entered in the United States District Court for the District of Massachusetts and sentences imposed on the defendant, Eric Leppo, following a bench trial on stipulated facts on four counts of interstate transportation of stolen property, in violation of 18 U.S.C. § 2314. Thereafter, the United States Court of Appeals for the First Circuit affirmed the conviction.

On July 8, 1997, Eric Leppo was named as the sole defendant in a four-count indictment returned to the United States District Court for the District of Massachusetts. (A. 72a). Each count charged that, on a particular date between July 15, 1996, and September 19, 1996, Mr. Leppo transported or caused to be transported in interstate commerce polyester film valued at between $20,291 and $62,207, which he knew was stolen or taken by fraud, in violation of 18 U.S.C. § 2314. *Id.*

Count 1 of the indictment averred that on or about June 19, 1996, Spectrum Marketing, Inc. ("Spectrum") shipped over 41,000 pounds of polyester film from Ft. Worth, Texas, to Tobin Industries, Inc. (a company owned and operated by the defendant, Eric Leppo), in Weymouth, Massachusetts.[1] (A. 72a-73a; Indict. ¶¶1, 2, and 4). Tobin Industries ("Tobin"), through Mr. Leppo, agreed to purchase this film for $1.50 per pound. *Id.* On or about July 15, 1996, Tobin, through Mr. Leppo, sold the film to Ultra-Vac Metallizing Corporation, Inc. ("Ultra-Vac"), for $0.75 per pound. (A. 73a; Indict. ¶¶3 and 5). That same day, Ultra-Vac took delivery of the film at Tobin's warehouse in Massachusetts and shipped it to

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[1] Polyester film is "used in a wide variety of applications, including the packaging of snack foods and the manufacture of videotape." (A. 72a-73a; Indict. ¶2).

Connecticut. *Id.* Although Ultra-Vac paid Tobin $31,104 for the film, Mr. Leppo never paid Spectrum for it. *Id.*

Count 3 of the indictment averred that on or about July 25, 1996, Spectrum shipped over 39,000 pounds of polyester film to Tobin in Massachusetts, for which Tobin, through Mr. Leppo, agreed to pay $1.55 per pound. (A. 73a; Indict. ¶7). On or about September 2, 1996, Tobin, by and through Mr. Leppo, agreed to sell over 20,000 pounds of this shipment to Ultra-Vac for $0.95 per pounds. (A. 73a; Indict. ¶8). According to Mr. Leppo's invoice dated September 5, 1996, Ultra-Vac took delivery of this film "in Massachusetts with an ultimate destination of East Hartford, Connecticut." *Id.* On September 12, 1996, Ultra-Vac paid RA Industries, Ltd. (another company owned and operated by Mr. Leppo), $19,496.84 for this film. (A. 74a; Indict. ¶9). Mr. Leppo never paid Spectrum for it. *Id.*

Count 2 averred that on or about August 5, 1996, Spectrum shipped another 19,000 pounds of polyester film to Tobin and RA Industries, Ltd. ("RA Industries"), for which Mr. Leppo agreed to pay $1.55 per pound. (A. 74a; Indict. ¶12). On or about August 7, 1996, RA Industries, through Mr. Leppo, sold this film to Ultra-Vac for $1.08 per pound. (A. 74a; Indict. ¶13). Ultra-Vac took delivery of this film in Massachusetts, and shipped it to Connecticut. *Id.* On August 28, 1996, Ultra-Vac paid RA Industries $21,024.36 for this film, but RA Industries never paid Spectrum for it. (A. 74a; Indict. ¶14).

Count 4 averred that on or about September 19, 1996, Mr. Leppo agreed to sell another 13,000 pounds or more of polyester film to Ultra-Vac for $0.80 per pound. (A. 74a; Indict. ¶10). Ultra-Vac took delivery of this film in Massachusetts. (A. 61a; Agmt. ¶1.a). On October 3, 1996, Ultra-Vac paid RA Industries $10,472.80 for this film, but RA Industries never paid Spectrum for it. (A. 74a; Indict. ¶11).

Mr. Leppo pleaded not guilty. On October 22, 1997, Mr. Leppo entered an agreement with the government. (A. 60a-67a). Under the terms of that agreement, Mr. Leppo agreed to waive his right to a jury trial, and he stipulated that he knew that the film purchased by Ultra-Vac from Tobin and RA Industries had been stolen, converted, or taken by fraud. (A. 61a; Agmt. ¶1.b). Mr. Leppo further stipulated that when Ultra-Vac purchased film from Tobin and RA Industries in Massachusetts, Mr. Leppo "expected that Ultra-Vac would transport the film to its place of business in Connecticut." (A. 61a; Agmt. ¶1.d). Nothing in the evidence suggests that Mr. Leppo himself participated in transporting the film in interstate commerce. (A. 60a-67a, 72a-76a).

On November 3, 1997, following a bench trial on stipulated facts before the Honorable Robert E. Keeton, United States District Judge for the District of Massachusetts, Mr. Leppo was found guilty on all four counts.[2] In support of its finding of guilty, the district court made the following finding of fact:

> So in summary, then, it is my finding that each of the elements of this offense charged as to each of Counts 1 through 4 is satisfied, that as to each of these four counts the defendant did engage in conduct that was a cause-in-fact of the transportation and did so with the state of mind of knowing that it was highly likely that that transportation would occur, and thus satisfied the willfully knowing element of the offense charged.

(A. 50a).[3]

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[2] Other than the stipulation and four government exhibits, consisting of invoices to and checks from Ultra-Vac, neither party introduced evidence at the bench trial.

[3] The court later "formally declare[d]" these to be its findings. (A. 56a).

The district court explicitly stated that it would not and did not apply 18 U.S.C. § 2(b), which punishes as a principal one who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States." (A. 51a-53a). Instead, the court found that the facts as stipulated by the parties met the government's burden under 18 U.S.C. § 2314 without reference to § 2(b). *Id.*

On April 23, 1998, the district court sentenced Mr. Leppo, as the parties had recommended in their agreement, to four concurrent 12-month-and-one-day terms imprisonment, followed by a three-year term of supervised release. (A. 14a). The district court recommended to the Bureau of Imprisonment that Mr. Leppo serve his term of imprisonment "in community confinement, with work release and release for other appropriate purposes including spending time with his children." (A. 28a). The court also imposed $400 in special assessments and ordered Mr. Leppo to pay $153,062 in restitution. (A. 24a). The district court's judgment of conviction and sentence was entered on the docket on May 23, 1998. Mr. Leppo filed a timely notice of appeal on May 19, 1998.

On May 27, 1999, the United States Court of Appeals for the First Circuit issued its decision in this matter affirming the judgment entered in the district court. The appeals court noted that the district court "stated that it acted under § 2314 and rejected § 2(b) because it was not recited in the indictment", but it also noted that [i]n spite of this [the district court] went on to say that the issue was 'whether the defendant, quote, willfully caused, unquote, the transportation across state lines'." (A. 4a-7a; *United States* v. *Eric Leppo*, 177 F.3d 93, 95 (1st Cir.1999)). The appeals court noted that the district court "stated that 'willfully caused means that the defendant must have the state of mind of knowing that his conduct is creating a likelihood — not a certainty, but I would say a strong likelihood — that the goods will be transported across state lines as a result of his conduct.'" (A. 4a-7a; *Leppo*, 177 F.3d at 95). After

concluding that the district court was now "self-instructed as to willfully caused", the appeals court held that "[w]hile the court erred as to § 2314 rather than taking these words from § 2(b), the error, word-wise, was harmless", noting that the "words applied automatically to § 2314 because § 2(b) is a general definitional statute." (A. 4a-7a; *Leppo*, 177 F.3d at 95).

In light of the foregoing, the appeals court viewed the issue before it as whether the district court's interpretation of the words "willfully caused" was correct. Noting that a "wide national disagreement [exists] on this important subject", (A. 4a-7a; *Leppo*, 177 F.3d at 96), the appeals court discussed several cases from several different circuits "to indicate the mistreatment of this subject and not to influence [its] own decision", (A. 4a-7a; *Leppo*, 177 F.3d at 96). However, the appeals court did not reach the ultimate issue of what constitutes the proper interpretation of this legal term; rather, it concluded that even if it were "free to adopt" the requirement that one's actions must be "purposeful" in order to satisfy the "willful causation" requirement of § 2(b), as the United States Court of Appeals for the Ninth Circuit requires, "it would not help [this] defendant." (A. 4a-7a; *Leppo*, 177 F.3d at 97). The appeals court concluded in the following manner:

> It is true that the district court's expressed finding that defendant willfully caused the interstate transportation contained no statement that it was intentional, or served his purpose, but neither was there a relevant exception taken. Defendant saved his rights, we have accepted, in his stipulation, 'Defendant contests the legal conclusion that the jurisdictional interstate commerce element is met.' This he paraphrased in his belief as the issue: 'Was the evidence sufficient?' The answer to that question is clear even within the Berlin rule. The agreed

> facts warranted an inference that, in picking an out-of-state-buyer on four occasions, defendant, with hot goods, affirmatively intended to distance them from himself. An acceptable inference is evidence of record. That the court failed to find it is not an issue raised in this appeal.

(A. 4a-7a; *Leppo*, 177 F.3d at 97).

ARGUMENT.

Introduction

Section 2(b) of Title 18 of the United States Code clearly requires that an aider and abettor must "willfully cause" another to transport stolen goods in interstate commerce in order to be convicted of violating the first paragraph of 18 U.S.C. § 2134, the so-called National Stolen Property Act. In this case, the district court clearly disavowed 18 U.S.C. § 2(b) as a basis of conviction, despite the fact that there is no evidence in this case that the defendant in fact transported stolen property in interstate commerce, and merely created its own evidentiary standard and definition as to whether the defendant willfully caused another to transport stolen goods in interstate commerce. A split occurs among the circuits regarding the state of mind necessary in order to convict an individual of willfully causing another to transport stolen goods in interstate commerce in violation of the first paragraph of 18 U.S.C. § 2134, and the willful causation requirement of 18 U.S.C. § 2(b) has been repeatedly ignored by several circuits when analyzing this issue. The instant petition for a writ of certiorari should be granted so that a uniform standard can be formulated and applied in National Stolen Property Act cases, such as this one, wherein the government

necessarily relies upon 18 U.S.C. § 2(b)'s willful causation requirement in order to convict the defendant of violating the first paragraph of 18 U.S.C. § 2134.

a. *The genesis of 18 U.S.C. § 2134 and 18 U.S.C. § 2(b).*

The defendant in this case was convicted of violating the first paragraph of section 2314 of Title 18 of the United States Code, the so-called National Stolen Property Act, which Congress enacted in 1948 in an effort to consolidate several sections from the 1940 edition of the United States Code. *See United States* v. *Leppo*, 177 F.3d 93, 94 (1st Cir.1999); Act of June 25, 1948, ch. 645, 62 Stat. 683, 806. The first paragraph of section 2314 makes it unlawful for one to *transport* in interstate commerce enumerated types of property known to have been stolen or obtained by fraud, but it makes absolutely no mention whatsoever of individuals who *cause* such transportation:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud . . . shall be punished. . . ."

18 U.S.C. § 2314. Prior to the enactment of the National Stolen Property Act in 1948, the pertinent federal statute prohibiting interstate transportation of stolen goods contained the word "cause" therein, and it therefore punished those persons who actually transported the stolen goods and those persons who caused such transportation. 18 U.S.C. § 415 (1940) ("Whoever shall transport or cause to be transported in interstate or foreign commerce any

goods . . ."). When it enacted the National Stolen Property Act, however, Congress intentionally omitted the word "causes" from the first paragraph and it transferred said term to § 2(b) of Title 18 of the United States Code. *See Leppo*, 177 F.3d at 94, *citing* Act of June 25, 1948, ch. 645, 62 Stat. at 684.

In 1951, Congress amended § 2(b) of Title 18 by modifying the verb "causes" with the adverb "willfully", Act of Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 710, 717, so that it presently reads as follows:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2(b) (West 1999) (emphasis added). "Thus, since 1948 the word 'causes' has not appeared in § 2314, appearing instead in § 2(b), and since 1951 it has there been modified by 'willfully'." *Leppo*, 177 F.3d at 95. In short, "[s]ection 2314 applies to transporters; § 2(b) to one who willfully causes one to act." *Id.*

b. *Section 2(b) is an important federal criminal statute that applies to virtually every criminal prosecution, various circuits have completely ignored the clear Congressional intent that a conviction under § 2314 in reliance upon § 2(b) requires "willful causation", and a split exists among several circuits regarding the state of mind necessary in order to convict an individual under these statutory provisions.*

Certainly, the prevalence of section 2(b) in our federal criminal judicial system, and its significance to that system, can not be overstated. Indeed, section 2(b) of Title 18 of the United States Code "applies generally to all federal criminal statutes", *United*

States v. *Lennon*, 751 F.2d 737, 741 (5th Cir.1985), it is implicit in every indictment that charges a substantive offense, *United States* v. *Sabatino*, 943 F.2d 94, 99-100 (1st Cir.1991), and the Government need not even plead this statutory provision for an aiding and abetting conviction to be returned, *Id. See United States* v. *Sanchez*, 917 F.2d 607 (1st Cir.1990) ("aiding and abetting is not a separate offense" and "[a]ll courts of appeals which have considered the matter have concluded than an 'aiding and abetting' instruction may be given even though the indictment neither alleges aiding and abetting nor adverts to 18 U.S.C. § 2(b)").[4] In short, this statutory provision is implicated in every criminal prosecution pursued by the Government that involves a substantive offense. As such, it is critical that our trial courts apply a single, uniform evidentiary standard when considering whether the particular defendant "willfully caused" another to transport stolen goods in interstate commerce in violation of the first paragraph of 18 U.S.C. § 2134, and it is critical that our appellate courts apply a single, uniform evidentiary standard when determining whether the evidence admitted during trial was sufficient to sustain such a conviction.

Remarkably, as the United States Court of Appeals for the First Circuit explicitly acknowledged in the case at bar, a "wide national

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[4] *See also United States* v. *Taylor*, 464 F.2d 240, 241 n.1 (2d Cir.1972); *United States* v. *Forsythe*, 560 F.2d 1127, 1136 n.15 (3d Cir.1977); *United States* v. *Duke*, 409 F.2d 669, 671 (4th Cir.1969); *United States* v. *Gordon*, 812 F.2d 965, 969 (5th Cir.1987); *United States* v. *Lester*, 363 F.2d 68, 72 (6th Cir.1966); *United States* v. *Moya-Gomez*, 860 F.2d 706, 756 (7th Cir.1988); *United States* v. *Sannicandro*, 434 F.2d 321, 324 (9th Cir.1970); *Lawrence* v. *United States*, 357 F.2d 434, 438 (10th Cir.1966); *United States* v. *Martin*, 747 F.2d 1404, 1407 (11th Cir.1984).

disagreement [exists] on this important subject", and it has been the subject of significant "mistreatment" by the various circuits since this Court decided *Pereira* v. *United States*, 347 U.S. 1 (1954). *Leppo*, 177 F.3d at 95. In *Pereira*, wherein the defendant presented a check drawn on an out-of-state bank to an intrastate bank for collection, this Court held that to constitute a violation of the first paragraph of the National Stolen Property Act "it is not necessary to show that petitioners actually mailed or transported anything themselves; it is sufficient if they *caused* it to be done." *Pereira*, 347 U.S. at 8 (emphasis added), *citing* 18 U.S.C. § 2(b). While the Court regrettably made no mention of the word "willfully" in its analysis, it clearly equated the term "caused" with knowledge and intent:

> When Pereira delivered the check, *drawn on an out-of-state bank*, to the El Paso bank for collection, he 'caused' it to be transported in interstate commerce. It is *common knowledge* that such checks must be sent to the drawee bank for collection, and it follows that Pereira *intended* the El Paso bank to send this check across state lines.

Pereira, 347 U.S. at 8 (emphasis added); *see Leppo*, 177 F.3d at 96 ("while making no mention of § 2(b)'s word 'willfully', [this Court] clearly based 'caused' on defendant's knowledge and intent"). Since the *Pereira* decision, there has been much confusion surrounding the role of § 2(b) when it must be relied upon to convict an individual under the first paragraph of § 2314. In short, § 2(b)'s "willful" language has been repeatedly ignored, and when it has been addressed it has not been defined in uniform manner. A split among the circuits can be illustrated by comparing decisions issued by the Fifth, Seventh, Eighth, Tenth and District of Colum-

bia Circuits with decisions issued by the First, Second and Ninth Circuits.

For example, in *United States* v. *Ludwig*, 523 F.2d 705 (8th Cir.1975), the defendant fraudulently drew two checks on his employer's accounts at a Missouri bank and he had a friend deposit the checks at a separate Missouri bank; apparently unbeknownst to the defendant the checks traveled through an Illinois bank in "the ordinary business practice" of the depository bank. *Ludwig*, 523 F.2d at 706. Without even discussing the fact that the drawee bank in *Pereira* was located out of state, and that *Pereira* was therefore held responsible for the "common knowledge" that the check would be sent to the drawee bank for collection, the United States Court of Appeals for the Eight Circuit, relying in part on *Pereira*, held that, in order to sustain a conviction under 18 U.S.C. § 2314, the government need not prove "some reasonable foreseeability that the instruments of the criminal fraud would travel in interstate commerce." *Ludwig*, 523 F.2d at 705. The Ludwig Court ignored the fact that this Court, in *Pereira*, obtained the word "cause" from § 2(b), and not from § 2314, and it failed to attribute any significance to (1) this Court's finding that the check in *Pereira* was "drawn on an out-of-state bank", (2) this Court's finding that it is "common knowledge that such checks must be sent to the drawee banks for collection", and (3) this Court's conclusion that "it follows that Pereira intended the El Paso bank to send this check across state lines." *Pereira*, 347 U.S. at 9. Critically, the Eighth Circuit Court of Appeals did not even mention the term "willfully cause" as it appears in § 2(b), and it certainly therefore did not analyze what state of mind is necessary in order to "willfully cause" another to transport stolen property in interstate commerce.

In *United States* v. *Scarborough*, 813 F.2d 1244, 1245-46 (D.C. Cir.1987), wherein the fraudulent check was drawn upon and deposited with banks in the same state, the District of Columbia Circuit followed the Eighth Circuit and held that "the government

should not have to prove that the interstate transport was in any way reasonably foreseeable", thereby adopting the rationale that "Congress intended interstate transportation to be 'merely the linchpin for federal jurisdiction' and did not mean to relate interstate movement to the culpability of the underlying criminal acts". *Scarborough*, 813 F.2d at 1245-46. Like *Ludwig*, the decision conspicuously omits any analysis of the interplay between § 2(b) and § 2134, and/or the "willful causation" requirement of the former statutory provision. In *United States* v. *Newson*, 531 F.2d 979, 981 (10th Cir.1976), the United States Court of Appeals for the Tenth Circuit joined the District of Columbia Circuit and the Eighth Circuit and held that "actual knowledge of the interstate transportation of the instrument on the part of the defendant is not required", as the "essence of the offense is the fraudulent scheme itself and the interstate element is only included to provide a constitutional basis for the exercise of federal jurisdiction." *Newson*, 531 F.2d at 981. Like the aforementioned circuits, the Tenth Circuit Court of Appeals did not analyze the interplay between § 2(b) and § 2314, despite the fact that the defendants in that case did not personally present the checks for payment to the bank, but rather had others do so at their request. *Newson*, 531 F.2d at 980.

The evolution of § 2(b) analysis took another strange turn in *United States* v. *Lennon*, 751 F.2d 737 (5th Cir.1985), wherein the defendant argued that "knowledge or reasonable foreseeability of interstate transport is required when the indictment and charge include[] the substance of 18 U.S.C. § 2(b) (1982)." After noting that the second paragraph of section 2314 contains a "causing" provision similar to section 2(b), the court did not agree "with Lennon's contention that by reference to section 2(b) in the indictment the government shouldered a burden of proving knowledge or reasonable personality of interstate transport." *Lennon*, 751 F.2d at 741. Rather, quite to the contrary, the United States Court of Appeals for the Fifth Circuit actually held that "the reference to 'causing' in

section 2(b) is mere surplusage to be ignored." *Lennon*, 751 F.2d at 741.

In a recent decision, *United States* v. *Lack*, 129 F.3d 403 (7th Cir.1997), similar to *Pereira*, the defendant cashed checks obviously drawn on out of state banks, which were then necessarily transported across state lines by the depository bank to the drawee bank as part of the regular collection process. *Lack*, 129 F.3d at 409. In that case, the Seventh Circuit Court of Appeals concluded that "the nature of the transporting required under either paragraph one or two of § 2314 is the same, and neither paragraph requires that the defendant have knowledge of the interstate transportation or that such transportation be reasonably foreseeable to him." *Lack*, 129 F.3d at 410, *citing Ludwig*, 523 F.2d 705, 706 n.2. Undoubtedly, the Seventh Circuit Court of Appeals' incorrect assertion that the evidentiary standard of proof is the same under either the first or second paragraph of 18 U.S.C. § 2134 stemmed from this Court's failure to include the word "willfully" in its analysis in *Pereira*, as the *Lack* Court specifically stated that "the Supreme Court has held that an individual may be found guilty under the first paragraph of that statute (when read in conjunction with 18 U.S.C. § 2(b)) even if he did not actually mail or transport anything himself; instead, it is sufficient to show that he caused it to be done." *Lack*, 129 F.3d at 410, *citing Pereira*, 347 U.S. at 8.

On the other hand, the Second and Ninth Circuits apparently require something more than the aforementioned circuits, and the First Circuit is apparently leaning in that direction. For instance, as discussed by the First Circuit Court of Appeals in the case at bar, in *United States* v. *Scandifia*, 390 F.2d 244 (2d Cir.1968), *vacated on other grounds sub nom Giordano* v. *United States*, 394 U.S. 310 (1969), in addressing the defendant's conviction of willfully causing interstate transportation of counterfeit securities in violation of § 2134 (which relies on § 2(b) for its "causing" provision), the Second Circuit Court of Appeals "rejected any suggestion that

ignorant causation-in-fact was sufficient to support [such] a conviction". *Leppo*, 177 F.3d at 96. In *United States* v. *Berlin*, 472 F.2d 13, 14 (9th Cir.1973), the United States Court of Appeals for the Ninth Circuit framed their issue in the following manner: "Under what circumstances can interstate transportation of a stolen car by a purchaser (innocent of knowledge that the car was stolen) be said to have been willfully caused by the seller so as to render him guilty of a Dyer Act violation under 18 U.S.C. § 2(b)" (emphasis added). The government argued that a conviction would be warranted whenever "the interstate transportation is reasonably foreseeable", but the Ninth Circuit Court of Appeals held that the Government's proffered rule was "too broad". *Berlin*, 472 F.2d at 14. The Ninth Circuit Court of Appeals specifically held that section 2(b) does "have overtones of agency, and, in [its] judgment, the willful causation to which it refers must be purposeful rather than based simply upon reasonable foreseeability." *Berlin*, 472 F.2d at 14 (emphasis added).

Finally, in this case, the First Circuit Court of Appeals brought to the forefront the significant mistreatment this subject has endured. After noting that it had previously used words such as "deliberately", *United States* v. *Andrade*, 135 F.3d 104, 110 (1st Cir.1998), and "awareness", *United States* v. *Cowden*, 545 F.2d 357, 263 (1st Cir.1976) when confronting this issue in the past, the First Circuit Court of Appeals acknowledged that "'willfully' is a strong word, particularly when it has been added by special amendment to limit the meaning of 'causes'." *Leppo*, 177 F.3d at 96. The First Circuit then concluded:

> The word 'willfully' was not mentioned in *Pereira*, let alone defined, but if we were moved to find ourselves free to adopt the *Berlin* limitation, or, more exactly, requirement, it would not help defendant. It is true that the district court's expressed finding that

> defendant willfully caused the interstate transportation contained no statement that it was intentional, or served his purpose, but neither was there a relevant exception taken. Defendant saved his rights, we have accepted, in his stipulation, "Defendant contests the legal conclusion that the jurisdictional interstate commerce element is met." This he paraphrased in his brief as the issue: "Was the evidence sufficient?" The answer to that question is clear even within the *Berlin* rule. The agreed facts warranted an inference that, in picking an out-of-state buyer on four occasions, defendant, with hot goods, affirmatively intended to distance them from himself. An acceptable inference is evidence of record. That the court failed to find it is not an issue raised on this appeal.

Leppo, 177 F.3d at 97.

c. *Synopsis: Respectfully, this Court should grant the defendant's petition, the Court should articulate the proper evidentiary standard to be utilized to determine whether a defendant has "willfully caused" another to transport stolen goods in interstate commerce, and the Court should remand the case at bar to the district court so that the trier of fact can analyze the evidence in this case in light of the newly enunciated standard of proof.*

The Eight Circuit Court of Appeals did not mention or analyze the term "willfully cause" in *Ludwig*, the District of Columbia Circuit likewise did not mention or analyze this term in *Scarborough*, and the Tenth Circuit Court of Appeals did not do so either in

Newson. The Fifth Circuit called the reference to "causing" in section 2(b) "mere surplusage to be ignored". The Seventh Circuit concluded that there is no difference between the nature of transporting required under either paragraph one or two of 18 U.S.C. § 2314, and thereby utterly ignored the term "willfully causes" appearing in 18 U.S.C. § 2(b). On the other hand, the Second Circuit rejected any suggestion that causation-in-fact was sufficient to support a conviction via § 2(b), and the Ninth Circuit specifically held that § 2(b)'s willful causation requires conduct that is purposeful, and that a "reasonable foreseeability" requirement is too broad. The First Circuit Court of Appeals concluded that the *Berlin* opinion contains "interesting thoughts", but, even if free to adopt its limitation, the court did not believe that it would help this defendant. Obviously, not only does a split exits among the circuits, but confusion pervades this issue as well.

The circuits that have ignored the clear language contained within § 2(b) have focused, in large part, on Congress' perceived intent in enacting § 2314 "to provide a means whereby federal authority could be invoked to punish unlawful deprivations of property which, by virtue of their interstate character, might escape the prosecutorial efforts of the states." *Ludwig*, 523 F.2d at 707. In so doing, however, these courts have utterly failed to focus and/or consider Congress' intentional omission of a "causing" provision from the first paragraph of § 2314 when it enacted the National Stolen Property Act in 1948, Congress' intentional movement of the "causing" provision to § 2(b) in the same Act, and Congress' intentional revision of § 2(b) in 1951 to include "willfully causes". Obviously, because Congress utilized the "cause" language in the second paragraph of § 2134, but not in the first paragraph, the rules of statutory construction require this Court to give meaning to Congress' decision not to include that language in the section of the statute under which Mr. Leppo was indicted. *Hohn* v. *United States*, __ U.S. __, __, 118 S.Ct. 1969, 1977 (1998) ("'where Con-

gress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion'", *quoting Bates* v. *United States*, 522 U.S. __, __, 118 S.Ct. 285, 287 (1997) (in turn quoting earlier authority). Moreover, because Congress explicitly amended § 2(b) to include only "willful" causation, this Court must give meaning to the plain terms of the pertinent statute and unambiguous intent of Congress. *See Dowling* v. *United States*, 473 U.S. 207, 213 (1985) (federal crimes "are solely creatures of statute" and "when assessing the reach of a federal criminal statute [this Court] must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of conduct of the conduct the enactment forbids. Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate").

United States Supreme Court Rule 10 explicitly provides that, in considering a petition for a writ of certiorari, this Court will consider, among other things, whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." As stated *supra*, § 2(b) is certainly an "important matter", as it is potentially implicated in every criminal prosecution brought by the Government. Finally, the petitioner has amply demonstrated that not only does a split exist among the circuits but that numerous circuits have patently ignored Congress' declared intent that one can not be convicted of "causing" another to be convicted of transporting stolen property in interstate commerce unless that causation is "willful".

In *Pereira*, this Court implicitly held that in order to "willfully" cause interstate transportation a defendant must act with knowledge and intent. In this case, the district court stated that it understood that "'willfully caused' here means that the defendant must

have the state of mind of knowing this conduct is creating a likelihood — not a certainty, but I would say a strong likelihood — that the goods will be transported across state lines as a result of his conduct." (A. 48a). Certainly, should this Court articulate a definition of "willfully cause" that differs from the district court's self-instruction, then the case at bar must be remanded so that the trier of fact (the district court) can determine whether the defendant's conduct satisfies the newly enunciated standard of proof.

CONCLUSION.

Wherefore, considering the foregoing, the Petitioner respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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October 18, 1999

APPENDIX TABLE OF CONTENTS

APPENDIX A

Order of the Court of the United States Court of Appeals for the First Circuit, dated July 20, 1999 ..... 1a

APPENDIX B

Opinion of the United States Court of Appeals, First Circuit, Heard Jan. 8, 1999 ..... 2a

APPENDIX C

Judgment in a Criminal Case of the United States District Court, District of Massachusetts, dated April 22, 1998 ..... 11a

APPENDIX D

Memorandum of Sentencing Hearing and Report of Statement of Reasons, dated March 28, 1998 ..... 26a

APPENDIX E

Transcript of Nonjury Trial Proceedings, dated November 3, 1997 ..... 35a

APPENDIX F

Agreement entered into between the United States Attorney for the District of Massachusetts, dated October 20, 1997 ..... 60a

APPENDIX G

Memorandum and Order of the United States District Court, District of Massachusetts, dated September 12, 1997 ..... 68a

APPENDIX H

Defendant's Motion to Dismiss Indictment, dated August 25, 1997 ..... 71a

APPENDIX I

Indictment of the United States District Court for the District of Massachusetts, dated July 8, 1997 ..... 72a

APPENDIX J

Statutory Appendix 77a

APPENDIX A

UNITED STATES
COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1604

UNITED STATES,
Appellee,
v.
ERIC LEPPO,
Defendant, Appellant.

Before:
Torruella, Chief Judge,
Alrich, Senior Circuit Judges.
Cudahy*, Senior Circuit Judge.

ORDER OF THE COURT

Entered: July 20, 1999

Upon consideration of the "Petition for Rehearing",
It is ordered that said petition for rehearing is hereby denied.

By The Court

PHOEBE MORSE

PHOEBE D. MORSE, Clerk

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* **Of the Seventh Circuit, sitting by designation**

APPENDIX B

UNITED STATES of America, Appellee,
v.
Eric LEPPO, Defendant, Appellant.

No. 98-1604.

United States Court of Appeals,
First Circuit.

Heard Jan. 8, 1999.

Decided May 27, 1999.

Following bench trial, defendant was convicted in the United States District Court for the District of Massachusetts, Robert E. Keeton, J., of causing the interstate transportation of stolen goods, and defendant appealed. The Court of Appeals, Bailey Aldrich, Senior Circuit Judge, held that: (1) district court's reference to erroneous statute for relevant causation language was harmless error, and (2) conviction was supported by evidence.

Affirmed.

Francis J. DiMento with whom DiMento & Sullivan, James H. Feldman, Jr., and Law Offices Alan Ellis were on brief for appellant.

Jeanne M. Kempthorne, Assistant United States Attorney, with whom Donald K. Stern, United States Attorney, was on brief for appellee.

Before Torruella, Chief Judge, Aldrich and Cudahy,* Senior Circuit Judges.

BAILEY ALDRICH, Senior Circuit Judge.

Eric LEPPO was indicted for and ultimately found guilty of causing the interstate transportation of stolen commercial polyester film in violation of 18 U.S.C. §§ 2314 and, see post, 2(b). His appeal is from the final judgment. Nowhere in the record is there to be found any expressed saving of rights. in his brief defendant's statement of the issue reads, "Was the evidence sufficient ... ?" The government does not claim defendant did not adequately save this question, and we accept. Where the facts were agreed to, and the court discussed legal adequacy with counsel at length, it would be unfair to do otherwise. However, we affirm.

The first[1] paragraph of § 2314, and the one to which we refer, presently reads as follows:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud [shall be punished.)

This provision, lacking "cause," was enacted in 1948 in consolidating several sections from the 1940 edition of the United States Code. See Act of June 25, 1948, ch. 645, 62 Stat. 683, 806. The relevant predecessor section had provided punishment for those who cause such interstate transportation as well: "Whoever shall transport or cause to be transported in interstate or foreign commerce any goods ..." 18 U.S 415 (1940) (emphasis added).

---

* Of the Seventh Circuit, sitting by designation.

[1] There is a second paragraph, not to be confused with § 2(b) herein. It contains the word "cause," but is not relevant because it relates only to transporting persons.

"[C]ause" was transferred § 2(b) in the same act of 1948. See ch. 645, 62 Stat. at 684. In 1951, without explanation, Congress modified causes" by adding "willfully":[2]

> about the "willfully' addition. See S.Rep. No 1020 (1951), reprinted in 1951 U.S.C.C.A.N. 2578,2583.
>
> § 2 Principals
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Act of Oct. 31, 1951, ch. 655 § 17b, 65 Stat. 710, 717. Thus, since 1948 the word "causes" has not appeared in § 2314, appearing instead it § 2(b), and since 1951 it has there been modified by "willfully." Section 2314 applies to transporters § 2(b) to one who willfully causes one to act. See, e.g., quotation from United States v. Scandifia, post.

This case was tried to the court on defendant's stipulation to the factual allegations in the indictment, defendant's claim being that they were legally insufficient. Summarizing this agreement, defendant purchased quantities of commercial polyester film delivered to his Massachusetts place of business intending (successfully) not to pay for it. He sold four shipments to a Connecticut buyer, Ultra-Vac, who was ignorant of the fraud. It, or its designated trucker, took delivery in Massachusetts of the shipments, each worth over

---

[2] The relevant Senate report explained a contemporaneous change in § 2(b), but said nothing

$5,000, to be taken to Connecticut. Defendant had nothing to do with the shipment. He knew that this was the program, but disclaimed statutory coverage.

[1] In finding defendant guilty the court stated that it acted under 2314 and rejected § 2(b) because it was not recited in the indictment. In spite of this it went on to say that the issue was "whether the defendant, quote, willfully caused, unquote, the transportation across state lines." Continuing, it stated that "'willfully caused' means that the defendant must have the state of mind of knowing that his conduct is creating a likelihood-- not a certainty, but I would say a strong likelihood--that the goods will be transported across state lines as a result of his conduct." Thus self- instructed as to willfully caused, the court found it existed.

[2] While the court erred as § 2314 rather than taking these words from 2(b), the error, wordwise, was harmless. The words applied automatically to § 2314 because § 2(b) is a general definitional statute. See United States v. Sabatino, 943 F.2d 94, 99-100 (1st Cir.1991). Our question, therefore, is whether the court's interpretation of those words was correct. We add, in passing, that it was narrower than the government's, which is that no knowledge is necessary.

Because of wide national disagreement on this important subject, we will start with circuits that support the government's position. We begin with the Eighth. In United States v. Ludwig, 523 F.2d 705 (8th Cir.1975), the district court had convicted defendants under § 2314 of causing two converted checks to be transported in interstate commerce by presenting them for payment. The cashing bank and the drawee bank were in the same state and defendants had no knowledge or notice that their clearing practice involved interstate transportation of the checks. See id. at 706. Defendants

argued that the government's failure to prove reasonable foreseeability should have resulted in their acquittal, but the court concluded that such proof was not necessary. See id. at 706-707. For this it relied in part on Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954), but without noticing its clear language. The Pereira Court had obtained the word "cause" not from § 2314 (first paragraph), but from § 2(b):

> [I]t is not necessary to show that petitioners actually mailed or transported anything themselves; it is sufficient if they caused it to be done. 18 U.S.C. (Supp.V) § 2(b).

Id. at 8, 74 S.Ct. 358. At the same time, while making no mention of § 2(b)'s word "willfully," it clearly based "caused" on defendant's knowledge and intent:

> When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collection, he "caused" it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to send this check across state lines. Id. at 9. This finding of knowledge and intent was, of course, precisely inapplicable to Ludwig.

On Ludwig's facts the District of Columbia Circuit followed Ludwig's resolution. See United States v. Scarborough, 813 F.2d 1244, 1245-46 (D.C.Cir.1987). The Tenth Circuit, on the other hand, faced the same situation as that in Pereira, and cited it to support its affirmance. It went on to say, however, as the court in Ludwig did, that actual knowledge of the interstate transportation

was not required. See United States v. Newson, 531 F.2d 979, 981 (10th Cir. 1976).

In United States v. Lennon, 751 F.2d 737 (5th Cir. 1985), the Fifth Circuit, necessarily faced with § 2(b), it having been cited in the indictment, held that it could be disregarded as "mere surplusage," permitting it to rely on the "[s]ection 2314 ... 'causing' provision" that required no knowledge, noted in Ludwig. Id. at 741. There was, of course, no such in the relevant first paragraph.

Recently, in United States v. Lack, 129 F. 3d 403 (7th Cir. 1997) the Seventh Circuit charged defendant under 2314 in connection with the interstate clearing of stolen checks. The court cited Pereira, and on the facts was correct in its decision. But it also cited with approval Ludwig 'a denial that § 2314 "requires that the defendant have knowledge of the interstate transportation or that such transportation be reasonably foreseeable to him." Id. at 410.

We have cited these cases to indicate the mistreatment of this subject and not to influence our own decision. Some thirty-five years ago we took notice that a similar transportation Statute (stolen firearms, 15 U.S 902(g)), except that willfulness was not needed, did require knowledge, or at least reasonable grounds to know. See Nicolopoulos v. United States, 332 F.2d 247, 248 (1st Cir.1964). For this we relied on Pereira v. United States without noting, presumably since neither mentioned nor relevant, willfulness. See id. What knowledge is required to make willfullness?

We have considered this question on occasion, using words like "deliberately," United States v. Andrade, 135 F.3d 104, 110 (Ist Cir.1998), "awareness," United States v. Cowden, 545 F.2d 257, 263 (1st Cir. 1976), and "aware," United States v. Van Dusen, 431

F.2d 1278, 1281 (1st Cir.1970). At the same time, "willfully" is a strong word, particularly when it has been added by special amendment to limit the meaning of "causes." See ante. We note two sister circuits which, unlike the others cited, at least require the government to prove knowledge or reasonable expectation and suggest where mere knowledge or expectation may not be enough.

In United States v. Scandifia, 390 F.2d 244 (2d Cir.1968) vacated on other grounds sub nom Giordano v. United States, 394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed.2d 297 (1969), the defendant was convicted of willfully causing interstate transportation of counterfeit securities, a violation of the third paragraph of § 2314, which also relies on § 2(b) for its "causing" alternative. In affirming the conviction, the court rejected any suggestion that ignorant causation-in-fact was sufficient to support a conviction, and outlined its requirement:

> In the absence of some evidence that Scandifia intended, knew, or could have reasonably foreseen that the innocent persons to whom he entrusted the bonds would take them across state lines, we question whether the jury would have been justified in concluding that he did more than provide others with the opportunity to do that which the law forbids. And, to provide an opportunity would not seem ipso facto to brand one as the causer. Moreover, the causer as a principal has been eliminated from 18 U.S. §. 2314, and since the 1951 amendment, 18 U.S.C. § 2(b) has required that the defendant willfully cause the forbidden act to be done.

Id. at 249 (citation emitted; first emphasis added). Defendant had an interest and was very close to the opportunity, so he was

properly convicted, but might there be a known opportunity too remote to the defendant's interest to count against him?

Suppose a jeweler is selling stolen diamond rings to bona fide purchasers. He might select buyers from away for safety's sake. But suppose he indifferently offered to all comers, without inquiry or regard to their addresses. Would he come within the statute with respect to those customers who showed a "strong likelihood" that they came from another state, if that transporting was a mere happenstance? Suppose the seller knew the buyer of a stolen painting planned it for his local home, but also knew, or should have known, that the buyer's trucker's route would detour over the state line and back. Willful?

The opinion in United States v. Berlin, 472 F.2d 13 (9th Cir.1973) contains interesting thoughts. That case involved § 2312, the Dyer Act, so-called, covering interstate transportation of stolen automobiles. The court remarked that sometimes personal property was apt to cross state lines quite apart from any concern, purpose, or interest of the seller, concluding that only what was of the seller's interest or purpose in the Particular operation should count.

> Section 2(b) does, as appellants contend, have overtones of agency, and, in our judgment, the willful causation to which it refers must be purposeful rather than be based simply upon reasonable foreseeability.

Id. at 14. The court, however, with which we readily agree, felt this limitation would not help its defendants, as their operation was manifestly designed to handle stolen cars for out-of-state buyers. See id. at 15. Would it help this defendant?

The word "willfully" was not mentioned in Pereira, let alone defined, but if we were moved to find ourselves free to adopt the Berlin limitation, or, more exactly, requirement, it would not help defendant. it is true that the district court's expressed finding that defendant willfully caused the interstate transportation contained no statement that it was intentional, or served his purpose, but neither was there a relevant exception taken. Defendant saved his rights, we have accepted, in his stipulation, "Defendant contests the legal conclusion that the jurisdictional interstate commerce element is met." This he paraphrased in his brief as the issue: "Was the evidence sufficient?" The answer to that question is clear even within the Berlin rule. The agreed facts warranted an inference that, in picking an out-of-state buyer on four occasions, defendant, with hot goods, affirmatively intended to distance them from himself. An acceptable inference is evidence of record. That the court failed to find it is not an issue raised in this appeal.

Affirmed.

APPENDIX C

United States District Court

District of Massachusetts

UNITED STATES OF AMERICA
v.
ERIC LEPPO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: **1:97CR10173-001-REK**
Francis J. DiMento, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____
☐ pleaded nolo contendere to count(s) _____
which was accepted by the court
☒ was found guilty on count(s) 1,2,3,4.
after a plea of not guilty

Title & Section	Nature of Offense
18 U.S.C. § 2314	**Transportation of Stolen Goods**
18 U.S.C. § 2314	**Transportation of Stolen Goods**
18 U.S.C. § 2314	**Transportation of Stolen Goods**
18 U.S.C. § 2314	**Transportation of Stolen Goods**

Date Offense Concluded	Count Number(s)
07/15/1996	1
08/05/1996	2
09/02/1996	3
09/19/1996	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 024-38-1661
Defendant's Date of Birth: 04/24/1964
Defendant's USM No.: 21656-038
Defendant's Residence Address:
57 Kim Terrace
Stoughton, MA 02072
Defendant's Mailing Address:
57 Kim Terrace
Stoughton, MA 02072

Date of Imposition of Judgment: 03/23/1998

/s/
Signature of Judicial Officer

Hon. Robert E. Keeton
United States District Judge
Name & Title of Judicial Officer

4/22/98
Date

DEFENDANT: **ERIC LEPPO**
CASE NUMBER: **1:97CR10173-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 366 day(s).

The term of imprisonment is one year and one day. The term of imprisonment shall run concurrently on Counts 1-4.

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant should serve the sentence in community confinement, with work release for other appropriate purposes including spending time with his children.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.
☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 04/28/1998.
☐ as notified by the United States Marshal.
☐ as notified by the Probation of Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHALL

By_____
Deputy U.S. Marshal

DEFENDANT: **ERIC LEPPO**
CASE NUMBER: **1:97CR10173-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the

Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below) . The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendants compliance with such notification requirement.

DEFENDANT: **ERIC LEPPO**
CASE NUMBER: **1:97CRIO173-001**

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant is prohibited from possessing a firearm or other dangerous weapon.

2. The defendant is to participate in a mental health program m directed by the United States Probation Office, which program is to include participation in gamblers anonymous.

3. The defendant is prohibited from gambling.

4. The defendant is prohibited from frequenting gambling establishments, including casinos.

5. The defendant shall answer inquiries of the United States Probation Office.

6. The defendant shall permit the United States Probation Officer to visit him at his place of residence.

7. The defendant shall maintain employment.

8. The defendant shall notify the United States Probation Office of any change in employment or residence.

9. The defendant shall not commit any federal, state, or local crime.

10. The term of supervised release shall run concurrently on Counts 1-4.

DEFENDANT: **ERIC LEPPO**
CASE NUMBER: **1:97CR10173-001**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$	$	$ 153,062.00

☐ If applicable, restitution amount ordered pursuant to plea agreement ..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  ☐ The interest requirement is waived.
  ☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An

Amended Judgment in a Criminal Case will be entered after such determination.

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Spectrum Marketing, Inc.	$153,062.00	$153,062.00	100.000%
Totals:	**$153,062.00**	**$153,062.00**	

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: **ERIC LEPPO**
CASE NUMBER: **1:97CR10173-001**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $_____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ (e.g. equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay a $100 Special Assessment on each of Counts 1, 2, 3, and 4, for a total of $400.00 forthwith. The defendant has already paid in full the amount of Restitution owed to Spectrum Marketing, Inc.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: **ERIC LEPPO**
CASE NUMBER: **1:97CR10173-001**

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 13
Criminal History Category: I
Imprisonment Range: 12 to 18 months
Supervised Release Range: 2 to 3 years
Fine Range: $ 3,000.00 to $ 30,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 153,062.00

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentences is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v. CRIMINAL NO. 97-10173-REK

ERIC LEPPO,

Defendant

MEMORANDUM OF SENTENCING HEARING
AND
REPORT OF STATEMENT OF REASONS

KEETON, D.J.

Counsel and the defendant were present for sentencing hearing on **MONDAY, MARCH 23, 1998.** The matters set forth were reviewed and considered. The reasons for sentence pursuant to Title 18 U.S.C. §3553(c), as set forth herein, were stated in open court:

1. Was the presentence investigation report (PSI) reviewed by counsel and defendant including any additional materials received concerning sentencing? __X__ Yes ____ No

2.(a) Was information withheld pursuant to FRCrP 32(c)(3)(A)?

(b) If yes to (a), has summary been

provided by the court pursuant to FRCrP 32(c)(3)(B)? ____ Yes ____ No

3.(a) Were all factual statements contained in the PSI adopted without objection? _X_ Yes ____ No

(b) If not to (a) the PSI was adopted in part with the exception of the following factual issues in dispute:

(c) Disputed issues have been resolved as follows after ___ evidentiary hearing, ___ further submissions and/or ___ arguments:

4.(a) Are any legal issues in dispute? ____Yes _X_ No

If yes, describe disputed issues and their resolution:

5.(a) Is there any dispute as to guideline applications (such as offense level, criminal history category, fine or restitution) as stated in the PSI? ____Yes _X_ No

If yes, describe disputed areas and their resolution:

(b) Tentative findings as to applicable guidelines are

Total Offense Level: _13___
Criminal History Category: ___1____
_12___ to __18___ months imprisonment

__24__ to __36__ months supervised release
$3,000 to $30,000 fine (plus $14,520 cost of annual imprisonment/supervision)
$ 153,062 restitution, WHICH HAS ALREADY BEEN PAID.
$ __400__ special assessment ($ 100 on COUNTS 1-4)

6.(a) Are there any legal objections to tentative findings? ____Yes __X__ No

(b) If no, findings are adopted by the Court.

(c) If yes, describe objections and how they were addressed:
OR sentence hearings if continued to _____ to allow for preparation of oral argument or filing of written submissions by _____.

7.(a) Remarks by counsel for defendant.* __X__ Yes ____ No

(b) Defendant speaks on own behalf. __X__ Yes ____ No

(c) Remarks by counsel for government. __X__ Yes ____ No

*The order of argument and/or recommendations and allocution may be altered to accord with the Court's practice.

8. The sentence will be imposed in accordance with the prescribed forms in Bench Book Sec. 5.02 as follows:

ONE YEAR + ONE DAY imprisonment
_____ months/intermittent community confinement
_____ months probation
__36__ months supervised release

$_____$ fine (including cost of imprisonment/supervision)
$ HAS BEEN PAID IN FULL restitution
$ 400 special assessment ($ 100 on COUNTS 1-4)

Other provisions of sentence: (community service, forfeiture, etc.)

ON COUNTS 1-4, CONCURRENTLY: ONE YEAR + ONE DAY IN THE CUSTODY OF BUREAU OF PRISONS, FOLLOWED BY 36 MONTHS SUPERVISED RELEASE.

$100 SPECIAL ASSESSMENT ON EACH COUNT, FOR A TOTAL OF $400.

NO FINE BECAUSE OF LIMITED RESOURCES AND PRIORITY TO RESTITUTION AND FAMILY OBLIGATIONS OF SUPPORT.

RESTITUTION IN FULL IS APPROPRIATE AND HAS BEEN PAID.

SPECIAL CONDITIONS OF SUPERVISED RELEASE:

1. THE DEFENDANT IS PROHIBITED FROM POSSESSING A FIREARM OR OTHER DANGEROUS WEAPON.

2. THE DEFENDANT IS TO PARTICIPATE IN A MENTAL HEALTH PROGRAM AS DIRECTED BY THE UNITED STATES PROBATION OFFICE, WHICH PROGRAM IS TO INCLUDE PARTICIPATION IN GAMBLER'S ANONYMOUS.

3. REFRAIN FROM GAMBLING.

4. NOT FREQUENT GAMBLING ESTABLISHMENT.

5. COMPLY WITH CONDITIONS OF SUBSECTION 15-17 OF §3563(b).

6. MAINTAIN EMPLOYMENT.

RECOMMENDATION: THAT THE PERIOD IN CUSTODY BE SERVED IN AN INSTITUTION OF COMMUNITY CONFINEMENT WITH WORK RELEASE AND RELEASE FOR OTHER APPROPRIATE PURPOSES, INCLUDING TIME WITH THE CHILDREN.

ORDERED THAT THE DEFENDANT SELF-REPORT TO THE INSTITUTION DESIGNATED BY THE BUREAU OF PRISONS AT OR BEFORE 2:00 P.M., ON APRIL 28, 1998, ABSENT FURTHER ORDER OF THE COURT MODIFYING THE REPORTING DATE.

9. Statement of reasons for imposing sentence. Check appropriate space:

(a) _X_ Sentence is within the guideline range and that range does not exceed 24 months and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR ___ Sentence is within the guideline range and that range exceeds 24 months and the reasons for imposing the selected sentence are:

(b) ___Sentence departs from the guideline range as a result of
___substantial cooperation upon motion of the government

OR

___a finding that the following (aggravating or mitigating) circumstance exists that is of a kind or degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that this circumstance should result in a sentence different from that described by the guidelines for the following reasons:

(c) ___Is restitution applicable in this case? __X__ Yes ____ No

Is full restitution imposed? __X__ Yes ____ No

If no, less than full restitution is imposed for the following reasons:

(d) ___ is a fine applicable in this case? __X__ Yes ____ No

Is the fine within the guidelines imposed? _____ Yes __X__ No

If no, the fine is not within guidelines or no fine is imposed for the following reasons:

___ Defendant is not able, and even with the use of a reasonable installment schedule is not likely to become able, to pay all or part of the required fine; or

___ Imposition of a fine would unduly burden the defendant's dependents; or

___ Other reasons as follows: **PRIORITY TO RESTITUTION AND TO FAMILY OBLIGATIONS OF SUPPORT.**

10. Was a plea agreement submitted in this case? ____ Yes _X_ No

(a) If no to 10, was notice given to defendant of right to appeal and to have counsel on appeal? _X_ Yes ____ No

Did defendant request court to direct Clerk to file Notice of Appeal? ____ Yes _X_ No

Was Clerk so directed? ____ Yes _X_ No

(b) If yes to 10,

(1) was notice given to defendant of right to appeal (as to sentencing determination) and to have counsel on appeal? ____ Yes ____ No ____ Not Applicable

Did defendant request court to direct Clerk to file Notice of Appeal ____ Yes ____ No

Was Clerk so directed? ____ Yes ____ No

(2)check appropriate space:

___ The Court has accepted a Rule 11(a)(1)(A) charge agreement because it is satisfied that the agreement adequately reflects seriousness of the actual offense behavior and accepting the plea agreement will not undermine the statutory purposes of sentencing.

___ The Court has accepted a Rule 11(a)(1)(B) plea and has sentenced within the guideline range.

___ The Court has accepted a Rule 11(e)(1)(C) sentence agreement that is within the applicable guideline range.

___ The Court has accepted either a Rule 11(e)(1)(B) sentence recommendation or a Rule 11(e)(1)(C) sentence agreement that departs from the applicable guideline range because the Court is satisfied that such a departure is authorized by 18 U.S.C. § 3553(b).

11. Suggestions for guideline revisions resulting from this case are submitted by an attachment to this report. ____ Yes _X_ No

12. The PSI is adopted as part of the record, either in whole or in part as discussed above and is to be maintained by the U.S. Probation Department under seal unless required for appeal.

13. Judgment will be prepared by the clerk in accordance with above.

14. The clerk will provide this Memorandum of Sentencing Hearing And Report of Statement of Reasons to the U.S. Probation Department for forwarding to the Sentencing Commission, and if the above

sentence includes a term of imprisonment, to the Bureau of Prisons.

3/26, 1998

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * * * * * * * * * * * * * * * * *

UNITED STATES of AMERICA	* CRIMINAL ACTION
	* NO. 97-10173-REK
vs.	*
	* Courtroom 11
ERIC LEPPO	* Monday, November 3, 1997
	* Boston, Massachusetts

* * * * * * * * * * * * * * * * * * * *

NONJURY TRIAL PROCEEDINGS

DAY 1

BEFORE THE HONORABLE ROBERT E. KEETON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: OFFICE OF THE U.S. ATTORNEY
By: Jeanne M. Kempthorne, Esquire
Assistant U.S. Attorney
1107 Post Office & Courthouse
Boston, Massachusetts 02109

For the Defendant: DiMENTO & SULLIVAN
By: Francis J. DiMento, Esquire
Seven Faneuil Marketplace
Boston, Massachusetts 02109-1649

LEPPO & LEPPO
By: Robert M. Goldstein, Esquire
15 South Main Street
Randolph, Massachusetts 02368

Court Reporter: Timothy J. Willette, RDR
Official Court Reporter
U.S. District Court
603 Post Office & Courthouse
Boston, Massachusetts 02109
617.248.0604

INDEX

GOVERNMENT'S Closing Argument 1-4

DEFENDANT'S Closing Argument 1-7

* * * * *

EXHIBITS

NUMBER	DESCRIPTION	FOR ID	IN EVID.
GOVT A	Check No. 15800, Ultra-Vac to RA, $10,472.80, and invoices		1-3
GOVT B	Check No. 15245, Ultra-Vac to Tobin, $31,104.00		1-3
GOVT C	Check No. 15499, Ultra-Vac to RA, $22,734.45, and invoices		1-3
GOVT D	Check No. 15392, Ultra-Vac to RA, $65,432.76, and invoices		1-3
JOINT 1	Stipulation dated 10-20-97		1-4

[2] PROCEEDINGS

THE CLERK: Court is now in session. You may be seated.

This is criminal case number 97-10173-REK, United States of America versus Eric Leppo.

THE COURT: Good afternoon.

MS. KEMPTHORNE: Good afternoon, your Honor.

THE COURT: We are proceeding with a trial this afternoon, so I suppose I should first inquire whether you wish to make -- either of you wish to make opening statements. I am not urging you to because I think with your submissions and our previous hearings I understand the issues and of course I will hear your arguments after we've completed the evidence.

Does either of you wish to make an opening statement?

MS. KEMPTHORNE: No, your Honor.

MR. DiMENTO: Not I, your Honor.

THE COURT: All right. Did you wish to offer any further evidence?

MS. KEMPTHORNE: Yes, your Honor. In addition to the stipulations, which is already presented to the Court --

[3]THE COURT: Yes, I receive the stipulation in evidence.

MS. KEMPTHORNE: The Government has four exhibits which are premarked Exhibits A through D. They have been shown to defense counsel. They have no objection.

MR. DiMENTO: Yes, your Honor. With the understanding, of course, that nothing in them is intended to contradict the stipulation.

MS. KEMPTHORNE: Correct.

THE COURT: All right. I receive in evidence Government's Exhibits A through D.

MS. KEMPTHORNE: And, your Honor, that completes the Government's proof. The Government rests.

MR. DiMENTO: And I understand, your Honor, that -- I think you've just said that the stipulation has been marked as an exhibit.

THE COURT: Yes, the stipulation is received in evidence.

MR. DiMENTO: What number has been assigned --

THE COURT: Well, if you want it to be assigned a number, I will give it Number 1, and then if you wish to offer any other exhibits, I'll let them be designated as defendant's exhibits with letters.

MR. DiMENTO: I have nothing else to offer. I open and close all in one breath.

[4] THE COURT: All right. The stipulation is received in evidence as Exhibit 1, Joint Exhibit. And both parties have rested and I assume you wish to be heard in oral argument.

MS. KEMPTHORNE: Yes, your Honor.

GOVERNMENT'S CLOSING ARGUMENT

MS. KEMPTHORNE: Your Honor, pursuant to the stipulation, I think it's plain that the Government has met its burden with respect to all elements of the offense, the four offenses charged, 18 United States Code, Section 2314, and that the issue of dispute between the parties is whether or not the facts establish the jurisdictional element of interstate transportation.

The defendant's argument is that by merely knowing, expecting, intending that the goods would be transported from Massachusetts to Connecticut, that is insufficient to show the requisite jurisdictional nexus. The Government takes the opposing view and submits that the Supreme Court cases and First Circuit cases arising under 2314 articulating the standard for interstate commerce in the statute demonstrate that the facts before the Court are ample to make the necessary finding.

Your Honor, I did submit four exhibits because they demonstrate, I believe, that the transactions from the very outset -- I'm referring now to Government Exhibits A [5] through D -- anticipated shipments to Connecticut from Massachusetts. In each case, the invoices of RA Industries, which is the company -- one of two companies that Eric Leppo operated -- indicate that the shipments were to be made to Ultra-Vac Metallizing in Connecticut.

As I point out in my memorandum, your Honor, the f.o.b. points varied between Connecticut and Massachusetts, but in every instance it's very plain that the shipment was to take place to Connecticut, and that's upon Leppo's own documents as well as the company's, buying company, Ultra-Vac. The fact that the shipments are picked up at the warehouse in Massachusetts for delivery in Connecticut is ample proof that not only was it reasonably foreseeable, but in fact was actually foreseen and intended and negotiated that the shipments would be returned to the buyer at either its East Hartford or Bloomfield, Connecticut offices, and that is in fact

what was done as is stipulated in the -- as is alleged and stipulated in various paragraphs of the indictment.

Your Honor, I received shortly before the hearing today a memorandum in response to the Government's trial brief. The memorandum cites a California case from 1973 called U.S. vs. Berlin which arises out of the interstate transportation of a stolen motor vehicle and apparently articulates the rule that the purchaser -- that the [6] defendant has to have had a purposeful reason for the interstate transaction.

Your Honor, I believe that the court in the Ninth Circuit is saying that it can't be merely fortuitous that there be an interstate component and that's been articulated in a subsequent decision, but to the extent that that case stands for the proposition that some element of knowledge beyond reasonable foreseeability is required, it is not in concert with the First Circuit law, which is very plain that, at the most, causation contemplates mere reasonable foreseeability which the Government's proof exceeds here. We go well beyond foreseeability to actual knowledge that that's where the goods were going and in fact it's apparently negotiated as to where responsibility for the shipment ends, whether it's in Connecticut or Massachusetts, so there's no question at all.

I will note, your Honor, that in the few minutes I had before this hearing, I did Shepardize the Berlin case. It has not been followed -- it's been cited very rarely outside the Ninth Circuit, but it has been cited in the Fifth Circuit in a 1978 case called United States vs. Beil, B-E-I-L, and it's cited 577 F.2d 1313, and that case stands for the contrary proposition that you do not have to show that the intention to transfer across state lines is an integral part of the transaction. I believe the law, your [7] Honor, is that this is a mere jurisdictional requirement and that there is no specific intent element with respect to it.

Thank you.

THE COURT: Thank you.

DEFENDANT'S CLOSING ARGUMENT

MR. DiMENTO: If your Honor please -- by the way, may I introduce Mr. Robert Goldstein from Mr. Martin Leppo's office.

MR. GOLDSTEIN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. DiMENTO: Martin Leppo is at home immobilized with a back problem.

I heard Ms. Kempthorne to string together the words "knowing" and "expecting" and "intending." I do not agree with the last of those words. I do not agree that those words are synonymous. "Intending" in this context I believe to be a word of art, meaning a purposeful intent, that is, an intent to do something that serves the purpose of the actor, and I think that is what is meant in the Berlin and Backun cases, the Backun case being the one I cited in support of my motion to dismiss indictment, if you will recall.

And I heard Ms. Kempthorne to say that at most the Government need prove only foreseeability. with that I disagree.

[8] As I read the First Circuit, and particularly Nicolopoulos, the opinion by Judge Aldrich which was written -- I don't have the date offhand, but over 20 years ago.

MS. KEMPTHORNE: Fifty years ago, your Honor.

MR. DiMENTO: Fifty. What difference --

THE COURT: MY memory goes back that far.

(Laughter.)

MR. DiMENTO: As I read that, Judge Aldrich at the time and the court at the time expressly left open the issue we've presented here and clearly said that proof of foreseeability is a minimum requirement. It did not call that something that was the most that the Government had to prove.

And if I can call your attention, Nicolopoulos is at 332 -- it's 1964. Your Honor, it was 33 years ago. Nicolopoulos at 332 F.2d 247, at page 248, the court says:

"Yet under this statute, whatever else may be required, it must be that 'causing' interstate transportation requires knowledge on the part of the defendant, or, at least, reasonable grounds to know, that his conduct involves, or will result in, such commerce." And I do not think of reasonable foreseeability and actual foreseeability as being different for the purposes of this case.[9]

THE COURT: Well, Of course, that phrase used in the opinion is neither one of those, but "reasonable grounds to know."

MR. DiMENTO: Yes, and I don't make a distinction even there. I realize I'm in a courtroom that is particularly attuned to these differences in language in this area of the law and I'm probably better off for it. We all are. But I don't make a distinction between any of those variations in the language. If he has reason to foresee or has reasonable grounds to foresee or he actually foresees, it's all the same. And we have stipulated that he actually foresaw, that he expected the goods to be shipped in interstate commerce. And I'm not that much of a tort lawyer, but I understand in the civil law that if you have reason to believe something, then you are held to have believed it, or if you have reason to foresee --

THE COURT: Not as a general proposition, not as a general proposition. The First Circuit has just handed down a decision within a month or two involving that very question with respect to civil law as drawn into Puerto Rican law, and there are variations.

MR. DiMENTO: Well, for the purposes of this case, at least, I suggest that there is no distinction here and that the issue is, given the fact that the defendant expected these goods to be shipped in interstate commerce, [10] did he willfully cause the shipment. And of course, the Government as in most of these cases relies in large part on the check cashing cases, which I think Berlin very nicely distinguishes as a situation where the actor puts into motion a mechanism, indeed a mechanism that he wants to take advantage of when he steps up to the teller at his local in-state bank and asks that a check be cashed. The transaction is not complete simply at

the moment that the money is deposited to his account. Or indeed, if he should be in a position to collect cash immediately on it, the transaction is not complete because he is telling the teller and the bank to ship that check across state lines to the out-of-state bank. And I think if we look at it this way we can best understand it:

I don't imagine that a person with a stolen check or a forged check could possibly step up to the teller at his local in-state bank and say: "I wish to deposit this check, I wish to collect it, but I do not authorize you to transport this check across state lines, and as a matter of fact I forbid it." Under those circumstances, the bank would of course return the check to him. So from that I would infer that when he does step up to the teller's cage and deposits the check, he is impliedly authorizing the bank and all banks involved in the collection process to do whatever is necessary to collect that check and he is in [11] fact authorizing the bank and the whole system to send that check across the state line for collection. So all those cases I see as being totally distinguishable from what we have here.

And beyond that, there are any number of cases where Section 2(a), 18 U.S. Code, 2(a) are involved, and I think all those cases have to be set aside, 2(a) being what is commonly called the aiding and abetting statute where the agent is culpable as well as the actor, as well as the principal, or the principal is as culpable as the agent where there are in effect joint venturers, whatever you'd like to call them. All those go to the side, because those ultimately rest, as I think I stated in our memorandum, ultimately rest on the proposition that joint venturers and co-conspirators are held each to have appointed the others as agents for the purposes of achieving the common objective. So that's a matter of criminal law that's applicable to 2(a) and should be put aside.

In 2(b), we're dealing with words of art. In 2(b) the statute says that the actor must willfully cause, and I would think we would draw on the law of torts, if not completely, to a large measure, to a

large extent, in trying to analyze at the time what it means to willfully cause something. And what I submit to the Court is the definition is that the actor must intend that the stolen property [12] travel in interstate commerce and must intend that it do that because the travel will serve the actor's, the defendant's, purpose. If he has no concern and if his goal is achieved at the time that he sells the stolen goods to a person in state, and if he in no way could be said to have authorized that person to carry the stolen goods across state lines, then he has not willfully caused the transportation.

And I don't think there's much I can add in this courtroom to the concept -- to the definition of cause, but I do think that the chain has to end somewhere. I mean, we can all conceive of hypothetical cases where, to take the easy example, the thief who steals an automobile sells it to A, who sells it to B, who sells it to C, and during all those transactions the automobile maintains its status as stolen property, and then when C rides it across state lines, has the original thief caused -- willfully caused the travel across state lines?

Take, for example, if the thief were a Rhode Island resident. I mean, it's awfully hard to think you can sell an automobile in Rhode Island without some purchaser down the line wandering across to the Commonwealth of Massachusetts or the state of Connecticut or into -- I guess that's all that adjoins them, but it has to -- there has to be an end to this chain, and I suggest that the end is when [13] you sell it to an innocent purchaser, period. That's it. And you do not appoint that purchaser your agent to do anything that you want or serves your purpose in any way. As long as that hasn't happened, then the sale to the innocent purchaser draws the curtain down and that's the end.

THE COURT: Mr. DiMento, I am clearly persuaded that each of you is correct in some of your most basic criticism of the other's position in this case.

I think you are surely correct in stating at the outset of the response you filed today a point that is not new to me -- you stated it to me before in earlier proceedings in this case -- "That the issue is not" -- I'm quoting -- "as the government states, whether the defendant 'can escape criminal responsibility under 18 U.S.C., Section 2314 by virtue of having not personally transported the goods across state lines,'" and then I continue with your quotation, citing the Government's brief. "The issue is rather whether the defendant 'willfully caused' the interstate transportation within the meaning of 18 United States Code, Section 2(b)."

Now, I am not endorsing that second sentence. That is, I think you're right in the first sentence; you're not quite right in the second sentence, in my view. And likewise, Ms. Kempthorne is not quite right in the way she **[14]** is framing the issue that is before me.

Now, I want to state the issue as I see it, because then I want to invite both of you to focus on it more precisely, first you, Mr. DiMento, completing your argument, and then Ms. Kempthorne in her rebuttal argument.

The indictment in this case makes a whole series of factual allegations before we reach page 6 and paragraph 19 where the four counts are stated, and the allegations in paragraph 19, in the first place, do not make any reference to 18 United States Code, Section 2, either 2(a) or 2(b), and that in my view is significant. I'm not entirely clear that the failure to refer in the indictment to 18 United States Code, Section 2 would preclude the Government from proving a case in which the Government was proving a case in which the defendant was a principal only by reason of participation under Section 2, but that is not the case before me that the Government has indicted or sought to prove. So that makes all of the arguments about agency and 18 U.S. Code, Section 2 beside the point. Maybe appropriately argued to me by way of analogy to

help understand the whole situation, but nevertheless not directly in point, at most only relevant for consideration by way of analogy.

Instead, what paragraph 19 alleges is almost but not quite in the statutory language of the section alleged **[15]** to be violated, Title 18, United States Code, Section 2314. That statute in text does not have this phrase "willfully caused" in it, and I'll come back and say more about that in a few minutes. Instead, what it says is: "Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud" shall be guilty of an offense.

Now, neither the word "cause" nor the word "willfully" appears in the text of that statute, but I must also take into account that the Supreme Court of the United States and the circuit courts under the guidance and direction of the Supreme Court precedent interpret statutes, and in this instance, quite relevant to this charge, the First Circuit has interpreted this very statute in United States vs. Montminy --

MR. DiMENTO: Pardon me?

THE COURT: -- how do we pronounce that? -- 936 F.2d, 626-627, a 1991 decision, listing the elements of the statute in a way that does use the word "caused," does not use the word "willfully" but does use the word "caused."

The four elements as stated in that opinion at page 627 are: "1) goods, wares or merchandise were either converted or taken by fraud." That one is easily satisfied **[16]** in this case. I think the stipulation does. I'll call attention to some particular parts of the stipulation in a few minutes. That confirms my belief that element (1) is satisfied in this case both legally and factually.

Element (2) as quoted from the Montminy opinion is: "the defendant transported, or caused the transportation of the property, in interstate commerce," and I'll come back to talk more about that one in a moment.

Element (3): "the defendant knew that the property was converted or taken by fraud at the time of its transport." That one is easily satisfied in this case by the stipulation.

And (4): "the value of the property must exceed $5,000." That one is easily satisfied by -- I believe by the stipulation itself, but if not by the stipulation, by reasonable inferences to be drawn, which I do draw, from the stipulated facts.

MR. DiMENTO: There's no issue about that, your Honor.

THE COURT: Yes. All right. So now the critical question, then, comes down to whether the second of those elements as defined in the Montminy opinion has been satisfied, and in my view that is a mixed-legal-factual issue. It has some legal elements in it that I must decide, it has some historical factual elements that I must decide, [17] and perhaps I should identify the third subcategory, some evaluative elements as I apply the legal standard, as defined by strictly legal rulings, to the historical facts as I find them basically under the stipulation, although I think the additional evidence that the Government has offered in the Government's Exhibits A through D do reinforce some of the factual inferences that I draw, as I will explain.

Now, I will assume for the purpose of my deciding this close legal-factual issue in this case that it's appropriate for it to be characterized as an issue as to whether the defendant, quote, willfully caused, unquote, the transportation across state lines, that is, the transportation in interstate commerce.

But that is only the beginning of understanding the issue, because the term "willfully" in front of the verb, whether it's "caused" or whatever else -- in this instance it's "caused" -- is itself a term of varied meaning depending on the context, and there is a very large array of statutory provisions in the United States statutes and precedents in the decisions interpreting those statutes, a very large array of different meanings for "willfully," that is, meanings that are focused upon a differently defined state of mind.

Now, I do read "willfully" as a state-of-mind **[18]** requirement as distinguished from a simply objective standard about what one should have known. And in this respect I reject the Government's primary contention that I I don't even need to consider any factual issues because the only state-of-mind requirements under this Section 2314, properly understood, are concerned with whether the goods were stolen, whether they were converted, whether they were taken by fraud, understanding of those things as distinguished from understanding the matters that bear upon interstate transportation, which are the core of the jurisdictional issue that I have to consider in this case.

Now, when I examine that phrase "willfully caused" with the purpose of understanding more precisely what is the state of mind required for this particular offense, I conclude that the concept of causation that is relevant here is a concept that's associated with the cause-in-fact idea as we ordinarily think of that both in criminal law and in tort law, to which I agree we may look to some extent for analogy here, but of course looking more closely at the criminal cases especially.

And the cause-in-fact idea is one that is plainly satisfied factually in terms of historical facts in this case and I find as an historical fact that the transportation across state lines in relation to each of Counts 1 through 4 -- and there is a bit of difference **[19]** factually with respect to the different counts, as I recognize, but the transportation across state lines with respect to the film involved in each of those counts is a transportation that I find would not have occurred but for the defendant's conduct that is charged as a part of the factual conduct in violation of Section 2314 under each of the counts.

Now, of course, that is not all that is required. It is my understanding of the interpretation by the courts of this statute, including the interpretation in Montminy, that something more than just

cause-in-fact is required and exactly what more is involved in understanding the phrase "willfully caused" as it's applied here.

It is my understanding of this statute -- guided by Montminy in particular, but also in my view consistent with all of the whole array of other cases that each of you has cited to me, which are each distinguishable on the facts -- it's my understanding that "willfully caused" here means that the defendant must have the state of mind of knowing that his conduct is creating a likelihood -- not a certainty, but I would say a strong likelihood -- that the goods will be transported across state lines as a result of his conduct.

And I find that the factual element of the likelihood of their being transferred across state lines is [20] satisfied by, in the first place, the stipulated fact as stated in the stipulation at 1d., quote: "At the time of the delivery of the polyester film to Ultra-Vac at Defendant's warehouse in Massachusetts, Defendant expected that Ultra-Vac would transport the film to its place of business in Connecticut."

Now, of course, that is the transportation by another, not by the defendant, but the requirement is not that the defendant transport but that the defendant has the state of mind of knowing at the time of this conduct that it is likely -- and indeed I would say here highly likely -- that as a result of this conduct it will be transported across state lines by someone in connection with the consummation of the very agreement and arrangement he has made that constitutes the conduct charged in the indictment.

Now, if indeed I need to go to that third kind of thing, that is, the mixed-legal-factual evaluation, because of the fact -- it is only because of the fact that that stipulation of fact is not quite in the same words as I must frame the evaluative finding, that there was willful causing of this transportation growing out of the fact that when he engaged in the conduct he had the state of mind of knowing that it was highly likely that transportation across state lines by Ultra-Vac to its facility in Connecticut even with respect to those

of the transactions where the transfer to [21] Ultra-Vac occurred in Massachusetts was nevertheless sufficient to satisfy the "willfully caused" requirement, "willfully caused" element of the offense as I understand it under the First Circuit precedents for the reasons I've already explained.

So in summary, then, it is my finding that each of the elements of this offense charged as to each of Counts 1 through 4 is satisfied, that as to each of these four counts the defendant did engage in conduct that was a cause-in-fact of the transportation and did so with the state of mind of knowing that it was highly likely that that transportation would occur, and thus satisfied the willfully knowing element of the offense charged.

Now, that is a statement of what I expect my findings and conclusions to be unless you persuade me otherwise in whatever more you want to say now and I'll hear you further before I formally declare those to be my findings and conclusions.

MR. DiMENTO: Your Honor, I'm not sure I understand correctly, but I think -- I didn't at first, but I think now I do -- that you are interpreting "willfully caused" as it appears in Section 2(b), because it doesn't appear anywhere else.

THE COURT: No, that is not what I'm doing. That is not what I'm doing. [22]

Because, you see, if I were using 2(b) as the basis for my decision, then I would be talking about the defendant's conduct, helping somebody else satisfy the elements of the offense. That's not what I'm doing.

I'm saying that what the defendant himself did was a cause-in-fact of the transportation across state lines and that he did it with the state of mind of knowing that it was highly likely that that transportation across state lines would occur even though being done by someone else than himself, but not done by someone else as his agent or aider and abettor, just done by somebody else whom he could foresee and expected would do that transportation.

So for that reason, my view of this case is I am not making a decision that rests on a 2(b) foundation, but instead making a decision that rests on the interpretation of the prima facie elements, if you wish, by the defendant himself, by his own conduct, not by the conduct of somebody else, and with the state of mind on his part when he did it that satisfied the "willfully caused" requirement.

MR. DiMENTO: Well, I would suggest that the state of mind of the defendant is what is focused on in 2(b).

THE COURT: Well, it is, I agree, but the conduct that is focused on in 2(b) is not the conduct of the person charged in the indictment. It's the conduct of **[23]** somebody else helping a person charged in the indictment and making him also a principal by reason of helping that person.

You know, as I said to you at the outset, it may be that the Government could have, if they wished, made a charge under 2(b) as well. That would have been another basis on which this case might have been indicted and tried. It was not the basis on which they chose to do it, and because of my unease about whether a defendant ought to have adequate notice of the statute that he's charged with violating, I don't think it's appropriate for me to rest my judgment on that basis. That's why I do not do it on a 2(b) basis.

MR. DiMENTO: Well, then my position is, your Honor, that it is only through 2(b) that this defendant can be convicted, because I don't think -- and I'm looking at your quote from Montminy in your previous decision -- I don't think that the court -- the First Circuit's omission of the words "willfully caused" was advised in the sense that they gave it any thought. And the statute itself speaks only in terms of direct action by the defendant, did he transport or transfer or whatever.

THE COURT: Well, you see, there's where I depart from the reasoning you're suggesting, that the conduct of the defendant, what you're calling the direct **[24]** action by the defendant, does not have to extend to everything that's done in my interpretation of

the statute. It only has to be conduct that combined with what the defendant knows is highly likely to occur will be enough to cause this to happen, and as long as he -- he doesn't have to do everything himself. You know, that's a proposition that is true not only because of what 18 United States Code, Section 2 says. It's a proposition that is basically true quite apart from the addition of the specifics of 18 United States Code, Section 2 as to where one may be held liable as an aider and abettor.

Now, I recognize, I understand your position and I understand that it's a position reasonably to be argued. You'll have the opportunity to argue it again in the First Circuit. It is not a position that is persuasive to me.

MR. DiMENTO: Well, you know, the statute speaks in terms of the direct action and I as a lawyer who is familiar with 18 U.S. Code could only assume that the prosecution and the grand jury were relying on 2(b) when they used the word "caused" to be transported.

THE COURT: I don't understand if that's so why they didn't put 2(h) in the statement at the end, "All in violation of" where they name the statute. You know, 2 (b) -- or 2, rather, not often 2 (b) , but Section 2, is very often included in the statutes as to which it is alleged **[25]** that a particular conduct stated in a particular count is a violation. So there's nothing to stop them from putting it there and I suppose I draw somewhat the same inference that we are charged to draw when we're reading a statute that Congress enacts. They know how to do it. They didn't do it.

MR. DiMENTO: But the statute doesn't require -- no rule of pleading requires that Section 2(b) be recited when the Government intends to rely upon it.

THE COURT: Well, you may be right about that. I am a little more troubled about calling upon a defendant to respond to charges under a statute that is not mentioned in the indictment.

MR. DiMENTO: Well, I don't --

THE COURT: I know the Government sometimes argues to me they don't need to do that, especially in relation to Pinkerton problems that's been argued, but I'm troubled about it and I do not ordinarily proceed that way. If I am going to give a charge that's based on some statute that's not mentioned in the indictment, I usually take care to give notice and plenty of opportunity for consultation and even an opportunity for the Government to think about whether they want to file an amended indictment if that seems appropriate.

MR. DiMENTO: I don't think of myself as [26] representing a person who's answering to a charge of violating 2(b), because 2(b) does not -- or for that matter, 2 (a) does not charge a crime or set up a crime. Certainly 2(b) doesn't. It doesn't create a new crime. It simply recognizes a long-established rule, that what one does through another he does himself.

THE COURT: Well, you may be right about that, too. In a sense it may be declaratory of what the law was before.

MR. DiMENTO: Yes, and it doesn't set up a new crime, not at all. I mean, the crime still is 2314. And as soon as the Government must rely on causing transportation, as soon as that happens, it then necessarily has to go to 2(b) is our position. And I don't think that the law draws the lines and the distinctions that you're making today, which is altogether new to me. I mean, I'm here prepared to deal with 2(b) and 2314 and nothing else, and --

THE COURT: Well, and I am prepared to and am dealing with 2314 --

MR. DiMENTO: Yes, only.

THE COURT: -- and nothing else.

MR. DiMENTO: And nothing else. And I think that really crystalizes the issue, because it is our position that in these circumstances 2314 was not violated without proof that would rely on Section 2(b) or the rule of [27] law that Section 2(b) simply codified.

And the fact that 2(b) is not cited I suggest is totally immaterial. often 2(b) or 2(a) is cited unnecessarily. It's just sprinkled in and out or left out willy-nilly by the Government, and I never -- I never think of it as anything more than some guidance on what the Government is thinking. It's notice. It's part of the notice.

There are cases, as your Honor knows, where the statute is miscited and the appellate courts have held that that does not invalidate the indictment. A miscite seems to me worse than a lack of a cite.

So it seems to me that nothing at all could be made from the fact that it's not cited and that we're really talking 2(b). And once we talk 2(h), we're involving the concept of agency, and agency and the "but for" tests are two different animals, I would suggest to the Court, and I think those are the essential points where the defendant diverges, and most respectfully, of course, in your Honor's finding.

I look upon this as an agency problem. The rule that was codified comes from the Latin phrase which when translated means what one does through another he does himself, and those are the words of agency. And an agent is one who is appointed to act in order to serve the purposes **[28]** of the principal. The principal must get some benefit from it. And in every case that I have seen where 2(b) is involved, the principal does get some benefit, some purpose is served, even the check cases. Even those check cases where the principal gets his cash in advance, something is served, because he is relying on the system, a system that involves sending that check across state lines.

So, I dare say there are no cases in which 2 (b) is involved that do not involve this concept of agency and that is just, as I say, an animal of a different color altogether than is the --

THE COURT: Now, you see, you are using the term "agency" there, but everything you have just said is equally true of that other phrase that we sometimes use in relation to this kind of circum-

stance: "independent contractor. Everything one could do one's self but does by contracting with an independent contractor to do it for him may accomplish it that way and that does not relieve him of legal responsibility. Sometimes we speak about that in terms of non-delegable duty. That phraseology is more common in the tort context than in the criminal context, but the point remains that what you're saying about benefit is true in this case under my findings even if I do not treat -- what's the name, Univac?

MR. DiMENTO: Ultra-Vac.

[29] MS. KEMPTHORNE: Ultra-Vac.

THE COURT: Ultra-Vac -- even if I do not treat Ultravac as an agent but instead see them as an independent contractor with whom the defendant had a contractual arrangement under which they undertook to do something that would be of benefit to him, because the whole arrangement was one in which he was expecting to benefit from it and could be accomplished only through this purpose. So all that you've said about accomplishing something through an agent is equally true for this particular circumstance about accomplishing something through an independent contractor.

MR. DiMENTO: Except I do not believe that the independent contractor exists in the criminal law, and I think in the criminal law he is just another kind of agent.

THE COURT: I would put it another way: He exists under a different way of speaking, under different jargon, under different legal jargon, but nevertheless exists in fact.

MR. DiMENTO: Well –

(Laughter.)

MR. DiMENTO: Well, you know, whether you call it an agent or an instrumentality or an independent contractor, there has to be a continuing relationship can I use that as the generic description? -- a continuing [30] relationship between the defendant and the person who carries it across state lines, and that doesn't exist here. The relationship ended --

THE COURT: Well, I question that one also. It can be a relationship for a period of time instead of continuing under both agency law and independent contractor law in both tort and crime.

MR. DiMENTO: Well, I mean continuing beyond the time or through the time that the property passes over state lines. And there is no relationship here whatsoever after the delivery is made in Massachusetts, no relationship, no benefit, no purpose served. And, you know, the only way I can say it is, the curtain comes down and it certainly must come down somewhere.

I would wonder what would have happened if this -- if Ultra-Vac had sold it to somebody here in Massachusetts who then sent it over state lines, or just how many sales does it take before finally --

THE COURT: It would present a different question.

MR. DiMENTO: It would, certainly.

THE COURT: And I'm not going to try to solve that one.

MR. DiMENTO: Yes, I understand, but I think by saying that, you understand my position, that it's here [31] that the curtain falls, and I don't think that I can say it any better than I already have and I thank you.

THE COURT: All right. Thank you.

Ms. Kempthorne, did you want to say anything further?

MS. KEMPTHORNE: No, your Honor, I won't quibble with having succeeded. I do think the Court has overstated the Government's obligation, but if I've met a higher burden, then I'm satisfied.

THE COURT: All right. Then I now formally declare my findings and conclusions to be those I stated provisionally during the period after I had interrupted defense counsels summation, and for those reasons, I also now find that the defendant is guilty of the offense charged in each of Counts 1, 2, 3 and 4 of this indictment.

Now, that having been done, I suppose I must now set a time for a sentencing hearing and --

MR. DiMENTO: May I say something in that regard, your Honor?

THE COURT: Yes, you may.

MR. DiMENTO: If you will recall, the plea agreement calls for a total restitution prior to the time of the sentencing.

When we had originally -- when we were originally negotiating for this I was pushing for a plea agreement [32] which would call for payment after the sentencing, during the time while Mr. Leppo would be in a community center and would be able to work and keep his business growing, which has been doing very nicely in the past, and therefore held be able to generate the money to pay the restitution, or if not able to generate it all in one year -- he's not doing that well -- he could at least borrow it with the assurance to his borrower that he's able to earn the money now. His business isn't going to go down the drain because he's in jail. He will be able to work and give his lenders that kind of assurance.

Well, I wasn't in the best bargaining position, as you can imagine, and we finally had to agree that this would be paid before sentencing, which is a long way of saying that the longer between now and sentencing, the better, because we're going to have to find -- or convince the lender, and Mr. Martin Leppo, the defendant's father, is going to have to guarantee these payments, so we're going to have to convince them that these payments can be made.

THE COURT: Well, let's go at this question another way. Unless I make some special findings, I've got to have a presentence report in any event.

MR. DiMENTO: Of course.

THE COURT: And our ordinary timetable on that now is something like ten or 12 weeks. Even if I set it at [33] 10, which is a kind of a target aim, I usually get a request from the Probation Office for a minimum of 12.

So my thought would be that we ought to pick a date for the sentencing hearing approximately 12 weeks from today --

MR. DiMENTO: Okay.

THE COURT: -- and require that all of the things that have to be done by the Probation Office and then by counsel in response to whatever the Probation presentence report is, proceed under an order that Ms. Cull will issue at my direction, procedural order with respect to those matters.

So that would suggest a time in February 1998, and if you'll give me a moment to consult my calendar, one possibility would be 2 p.m. Wednesday, February 18. Does anybody have a problem with that time?

MR. DiMENTO: No.

MS. KEMPTHORNE: That's fine, your Honor.

THE COURT: All right. Then I'll set the sentencing hearing for that date and will direct that Ms. Cull issue the usual order with respect to other steps that need to be taken and you'll have copies of that promptly.

Anything else we need to do today?

MS. KEMPTHORNE: Just continue bail, I believe, on the same terms, your Honor.

[34] MR. DiMENTO: Yes, I hope so.

THE COURT: All right. So ordered.

MR. DiMENTO: Thank you.

THE COURT: All right. We'll be in recess.

THE CLERK: All rise.

(Proceedings concluded at 3:08 p.m.)

* * * * *

CERTIFICATE

I, TIMOTHY J. WILLETTE, Official Court Reporter for the United States District Court, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes, taken in the aforementioned matter, to the best of my skill and ability.

TIMOTHY J. WILLETTE, RDR
Official Court Reporter
U.S. District Court
603 Post Office & Courthouse
Boston, Massachusetts 02109
617.248.0604

APPENDIX F

U.S. Department of Justice
United States Attorney
District of Massachusetts

UNITED STATES DISTRICT COURT
DIST. OF MASS.
FILED IN OPEN COURT
DATE: 10/22/97
/s/ _____.

1003 J.W. McCormack Building P.O. & Courthouse
Boston, Massachusetts 02109

October 20, 1997

Francis J. DiMento, Sr., Esq.
DiMento & Sullivan
Seven Faneuil Marketplace
Boston, Massachusetts 02109-1649

Re: United States v. Eric Leppo,
Cr. No. 97-10173-REK

Dear Mr. DiMento:

This letter sets forth the agreement entered into between the United States Attorney for the District of Massachusetts ("U.S. Attorney") and your client, Eric Leppo ("Defendant") in the above-captioned case. The agreement is as follows:

1. Stipulations

The parties stipulate to the following:

a. The facts set forth in paragraphs 1-14 of the Indictment in the above-referenced case are true, except that notwithstanding the second sentence in paragraph 10 of the Indictment, Ultra-Vac took delivery of that shipment (and all shipments) in Massachusetts.

b. Defendant concedes the element of intent; accordingly, he neither admits nor denies the allegations contained in paragraphs 15 through 18, all of which bear on scienter.

c. The facts set forth in paragraph 19 of the Indictment are true, except that Defendant contests the allegation that he transported, transmitted or transferred, or cause to be transported, transmitted or transferred in interstate commerce the polyester film referenced in paragraph 19.

d. At the time of the delivery of the polyester film to Ultra-Vac at Defendant's warehouse in Massachusetts, Defendant expected that Ultra-Vac would transport the film to its place of business in Connecticut.

Defendant contends that he did not cause the goods to be transported or transferred in interstate commerce, and that knowledge and foreseeability of interstate transportation are insufficient to confer criminal responsibility. Thus, in summary, Defendant contests the legal conclusion that the jurisdictional interstate commerce element is met.

The U.S. Attorney contends that Defendant's expectation that Ultra-Vac would transport the goods to Connecticut is sufficient to meet the interstate jurisdictional element of the offenses charged.

The parties contemplate that this legal issue can be presented to the district court for resolution on the stipulated facts, but reserve the right to present documentary or testimonial evidence on the issue. Defendant will execute the appropriate waiver of jury trial.

2. Penalties

Defendant faces the following maximum penalties on each of the four Counts of the Indictment charging violations of 18 U.S.C. § 2314: a ten year term of imprisonment, a fine of $250,000, three years of supervised release, restitution in the principal amount of $153,062, plus interest, and a special assessment of $100 per count.

3. Sentencing Guidelines

The parties agree to take the following positions at sentencing with regard to offense conduct and adjustments under the United States Sentencing Guidelines:

a) U.S.S.G. § 2B1.1 applies to the offenses charged in the Indictment. The base offense level is 4.

b) The loss is more than $120,000, but less than $200,000, resulting in a 9-level increase.

c) The offense involved more than minimal planning, resulting in a 2-level increase.

d) With the exception of the legal jurisdictional issue described hereinabove, Defendant has agreed to accept responsibility for the charged offenses. Provided he does so, and does not dispute any relevant facts, the U.S. Attorney agrees to take the position that the

adjusted offense level should be reduced two levels pursuant to U.S.S.G. §3E1.1(a).

The losing party retains the right to appeal the court's legal ruling with respect to the jurisdictional issue. Provided the sentence is imposed within the guideline range determined in accordance with this paragraph, both parties waive the right to appeal the sentence.

4. The parties agree to recommend the following sentence:

a) a term of confinement at the low end of the guideline range applicable to an adjusted offense level of 13 (assuming Defendant accepts responsibility as provided in paragraph 3);

b) three years of supervised release;

c) full restitution to be paid before the date of sentencing; and

d) $400 special assessment, to be paid before the date of sentencing.

The parties shall jointly request the court to recommend to the U.S. Bureau of Prisons that Defendant serve his term of incarceration in a community confinement center.

Payment of restitution and the special assessment prior to sentencing is both a promise and a condition precedent to the obligations of the U.S. Attorney hereunder.

The parties have not reached agreement on the question of a fine, nor on the terms and conditions of supervised release.

The U.S. Attorney and Defendant each agree to take the position that there is no basis for a departure under the provisions of the United States Sentencing Guidelines, including, but not limited to, U.S.S.G. §§4A1.3 and 5K2.0-2.16. Accordingly, neither the

United States Attorney nor Defendant will seek a departure from the guidelines.

5. Court Not Bound By Agreement

The sentencing recommendations made by the parties and their respective calculations under the Sentencing Guidelines are not binding upon the United States Probation Department or the sentence which Defendant sentencing judge. Within the maximum sentence which Defendant faces under the applicable law, the sentence to be imposed is within the sole discretion of the sentencing judge. Defendant may not withdraw his stipulations and admissions because the United States Probation Department or the sentencing judge declines to follow the Sentencing Guidelines calculations or recommendations of the parties.

6. Information For Presentence Report

Defendant agrees to provide all information requested by the U.S. Probation Office concerning his assets and income.

7. Civil Liability

By entering into this agreement, the U.S. Attorney does not compromise any civil liability, including but not limited to any tax liability, which Defendant may have incurred or may incur as a result of his conduct and his admissions hereunder.

8. Rejection of Agreement By Court

Should this agreement not be accepted by the Court for whatever reason, or later be withdrawn on motion of Defendant, it shall be null and void at the option of the U.S. Attorney.

9. Breach of Agreement

If the U.S. Attorney determines that Defendant has failed to comply with any provision of this agreement, or has committed any crime during the pendency of this Agreement, the U.S. Attorney may, at his sole option, be released from his commitments under this agreement in their entirety by notifying Defendant, through counsel or otherwise, in writing. The U.S. Attorney may also pursue all remedies available to him under the law, irrespective of whether he elects to be released from his commitments under this agreement. Defendant recognizes that no such breach by him of an obligation under this agreement shall give rise to grounds for withdrawal of his stipulations and admissions hereunder. Defendant understands that should he breach any provision of this agreement, the U.S. Attorney will have the right to use against Defendant before any grand jury, at any trial, hearing or for sentencing purposes, the stipulations and admissions entered into in this agreement, without any limitation. In this regard, the Defendant hereby waives any defense to any charges which he might otherwise have under the Speedy Trial Act.

10. Who Is Bound

This agreement is limited to the U.S. Attorney for the District of Massachusetts, and cannot and does not bind the Attorney General of the United States or any other federal, state or local prosecutive authorities.

11. Complete Agreement

This agreement is the complete and only agreement between the parties. No promises, agreements or conditions have been entered into other than those set forth in this letter. This agreement super-

sedes prior understandings, if any, of the parties, whether written or oral. This agreement cannot be modified other than in a written memorandum signed by the parties or on the record in court.

If this letter accurately reflects the agreement entered into between the United States Attorney for the District of Massachusetts and Defendant, please have Defendant sign the Acknowledgment of Agreement below. Please also sign below as Witness. Return the original of this letter to Assistant U.S. Attorney Jeanne M. Kempthorne.

Very truly yours,

DONALD K. STERN
United States Attorney

By:

/s/
JAMES B. FARMER
Chief, Criminal Division

STEPHEN P. HEYMAN
Deputy Chief, Criminal Division

JEANNE M. KEMPTHORNE
Assistant U.S. Attorney

ACKNOWLEDGMENT OF AGREEMENT

I have read this letter of agreement in its entirety and discussed it with my attorney. I hereby acknowledge that it fully sets forth my agreement with the United States Attorney's Office for the District of Massachusetts. I further state that there have been no additional promises or representations made tome by any officials of the United States in connection with this matter.

Date: 10/22/97 /s/
ERIC LEPPO

I certify that this agreement letter has been read by Defendant and that he understands its terms.

/s/
Witnessed by:
FRANCIS J. DIMENTO, SR., ESQ.
Attorney for Defendant Eric Leppo

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)
	)
v.	) CRIMINAL NO.
	) 97-10173-REK
ERIC LEPPO,	)
Defendant	)
	)

Memorandum and Order
September 12, 1997

I.

Before the court is the Defendant's Motion to Dismiss Indictment (Docket No. 18, filed August 25, 1997), opposed by the government (Docket No. 22, filed September 8, 1997).

Defendant's Memorandum in Support of his Motion to Dismiss the Indictment (Docket No. 19, filed August 25, 1997) asks that the court dismiss the indictment in full, on the ground that it is inadequate under Russell v. United States, 369 U.S. 749 (1962). More specifically, defendant contends that Backun v. United States, 112 F.2d 635 (4th Cir. 1940), though not directly on point, is instructive for the purposes of evaluating the adequacy of the indictment in this case. The court concludes, however, that the portion of Backun referring to a "mere seller of merchandise" that defendant cites, when read in context, does not apply to allegations in this

case. For this reason, Backun does not aid evaluation of the adequacy of the indictment in this case.

The indictment properly pleads the offenses charged. The Court of Appeals for the First Circuit has unambiguously stated that the elements of the crime of interstate transportation of property taken by fraud are the following:

> 1) goods, wares, or merchandise were either converted or taken by fraud, 2) the defendant transported, or caused the transportation of the property, in interstate commerce; 3) the defendant knew that the property was converted or taken by fraud at the time of its transport; and 4) the value of the property must exceed $5,000.

United States v. Montminy, 936 F.2d 626, 627 (1st Cir. 1991). The indictment sets forth these elements and makes specific or implicit factual allegations as to each of them in a manner that apprises the defendant of the action against him. See Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. McLennan, 672 F.2d 239, 241 (1st Cir. 1982).

On the record before the court at this time, the court cannot sustain the contention that the court should make a generalized ruling in advance of trial that the evidence must show an intent to cause transportation across state lines, in a sense beyond knowledge or foreseeability of transportation as a consequence of defendant's conduct. A motion to dismiss an indictment is not a useful or appropriate vehicle for deciding what evidence available to the government will be proffered at trial, whether it will be received in evidence, and whether all the evidence received at trial will be sufficient to go to the jury on each count, even if not sufficient to go to the jury on all alternative grounds charged in all counts. Finally, arguments about the admissibility and effect of evidence

regarding "Leppo's invoice dated September 20, 1996," see Defendant's Memorandum in Support, Docket No. 19, page 1, are not decisive of the present motion to dismiss, as to any count.

ORDER

For the foregoing reasons, it is ORDERED:
Defendant's Motion to Dismiss the Indictment is DENIED.

/s/
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)
	) Cr. No. 97-10173-REK
v.	)
	)
ERIC LEPPO,	)
Defendant	)

DEFENDANT'S MOTION TO DISMISS INDICTMENT

The defendant moves that the indictment herein be dismissed as being insufficient to charge an offense against the United States.

By his attorneys,
DiMENTO & SULLIVAN

/s/_____

August 25, 1997

Francis J. DeMento
BBO No. 125000
Seven Faneuil Marketplace
Boston, Massachusetts 02109-1649
(617) 523-2345

I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE DOCUMENT WAS SERVED UPON THE ATTORNEY OF RECORD FOR EACH OTHER PARTY BY MAIL/HAND ON 8-25-97

/s/_____

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SEALED
97-10173REK

UNITED STATES OF AMERICA	)
	) CRIMINAL ACTION
v.	) No.
	) VIOLATIONS:
ERIC LEPPO,	) 18 U.S.C. § 2324 -
Defendant	) Transportation of Stolen
	) Goods

INDICTMENT

The Grand Jury charges:

COUNTS 1 - 4: 18 U.S.C. § 2314 (Transportation of Stolen Goods)

I. Persons and Entities

1. Eric Leppo ("Leppo"), defendant herein, is an individual who, at all times material to this indictment, was engaged in the packaging brokerage business. For the purpose of carrying on that business, Leppo owned and operated two Massachusetts corporations, Tobin Industries, Inc. ("Tobin") and RA Industries Ltd. ("RA Industries"), both of which had principal places of business in Randolph, Massachusetts and utilized warehouse and storage facilities in Weymouth and Randolph, Massachusetts.

2. At all times material to this indictment, Spectrum Marketing, Inc. ("Spectrum"), was a Texas corporation, with a principal place of business in Fort Worth, Texas. Spectrum was the United States representative of Polyplex, an Indian manufacturer of polyester film. Polyester film is a material used in a wide variety of applica-

tions, including the packaging of snack foods and the manufacture of videotape. Polyplex polyester film was marketed under the brand name "Sarafil."

3. Ultra-Vac Metallizing Corporation, Inc. ("Ultra-Vac") is a Connecticut business corporation with principal places of business in Bloomfield and East Hartford, Connecticut. It is engaged in the business of converting, metallizing, and brokering plastic film.

II. Summary of Transactions

A. First Shipment

4. On or about June 19, 1996, Spectrum shipped 41,471.90 lbs. (24 pallets) of 48 gauge, 25" polyester film from Fort Worth, Texas to Tobin's warehouse facility in Weymouth, Massachusetts. Leppo, on behalf of Tobin, agreed to purchase the film and to pay Spectrum a price of $1.50 per pound.

5. On or about July 15, 1996, Leppo, on behalf of Tobin, negotiated the sale of the Spectrum material to Ultra-Vac for $.75 per pound. On or about that date, Ultra-Vac took delivery of the material at Tobin's warehouse facility in Weymouth, Massachusetts, and shipped the material to Connecticut.

6. Ultra-Vac paid Tobin $31,104.00 for the material by check dated July 25, 1996. Leppo never paid any money to Spectrum for the first shipment.

B. Second Shipment

7. On or about July 25, 1996, pursuant to a purchase order that Leppo negotiated, Spectrum shipped 39,104.1 lbs of 92 gauge (1 mil) polyester film in a variety of widths to Tobin in Massachusetts. Leppo agreed to pay Spectrum $1.55 per pound for this shipment.

8. On or about September 2, 1996, Leppo agreed to sell to Ultra-Vac 20,523 lbs. of the Spectrum material at $.95 per pound. According to Leppo's invoice dated September 5, 1996, Ultra-Vac took delivery in Massachusetts with an ultimate destination of East Hartford, Connecticut.

9. By check dated September 12, 1996, Ultra-Vac paid RA $22,734.45, of which $19,496.85 was for the Spectrum material. Leppo never paid any money to Spectrum.

10. On or about September 19, 1996, Leppo agreed to sell to Ultra-Vac 13,091 lbs. of 1 mil Spectrum polyester film at $.80 per pound. According to Leppo's invoice dated September 20, 1996, Ultra-Vac took delivery in Connecticut.

11. By check dated October 3, 1996, Ultra-Vac paid RA $10,472.80 for the Spectrum material. RA never paid any money to Spectrum for the material.

C. Third Shipment

12. On or about August 5, 1996, pursuant to a purchase order that Leppo negotiated on behalf of Tobin and RA, Spectrum shipped 19,499.64 lbs of 48 gauge, 22" polyester film from Fort Worth, Texas, to a warehouse in South Hingham, Massachusetts. Leppo agreed to pay $1.55 per pound for the material.

13. On or about August 7, 1996, Leppo, on behalf of RA, negotiated the sale of the Spectrum material to Ultra-Vac for $1.08 per pound. On or about August 8, 1996, Ultra-Vac took delivery of the material (19,467 lbs.) at Tobin's warehouse facility in Weymouth, Massachusetts, and shipped it to Connecticut.

14. By check dated August 28, 1996, Ultra-Vac paid RA $65,432.76, of which $21,024.36 was in payment for the Spectrum material purchased from RA. RA never paid any money to Spectrum for this shipment.

III. False Claims of Theft and Damage

15. In or about August 1996, a representative of Spectrum made several inquiries about the outstanding invoices, totalling $153,062, due from Tobin and RA. In response, Leppo falsely claimed that the material had been stolen from the warehouse the previous weekend, that is, in early August. As Leppo knew, there had been no theft from the warehouse.

16. In fact, Leppo had made an earlier claim of theft and damage of material. On or about June 26, 1996, he made an oral claim to the Randolph police and to his insurance company claiming that he had sustained losses as a result of the theft by a moving company of polyester film on or about June 18, 1996. He also claimed that he had sustained losses as a result of damage to material while in storage at the warehouse facility. Ultimately, Leppo dropped both claims.

17. The moving company, Farrell Moving and Storage Co., did retain some polyester film material (approximately 2300 lbs.) as a result of Leppo having failed to pay the moving bill. The material retained was not Spectrum material. Indeed, as Leppo knew, he took delivery of the Spectrum material after the warehouse move.

18. During the period of time that Leppo ordered and took delivery of polyester film from Spectrum and then resold it to Ultra-Vac, Leppo was paying himself and other family members exorbitant sums from Tobin and RA bank accounts. While Leppo-owned and controlled businesses owed Spectrum over $153,000, they received over $173,000 from Ultra-Vac, for Spectrum and other goods. Between June 26 and October 16, 1996, instead of paying Spectrum, Leppo wrote checks to himself and to other family members totalling well over $100,000. Much of this money was spent gambling. In 1996, Leppo purchased over $273,000 in chips at Foxwoods Resort Casino.

19. On or about each of the dates set forth hereinbelow, at Weymouth and Randolph, in the District of Massachusetts,

ERIC LEPPO,

defendant herein, did transport, transmit, and transfer, and cause to be transported, transmitted, and transferred, in interstate commerce goods, wares, and merchandise, to wit, polyester film, of the value of $5,000 and more, knowing the same to have been stolen, converted, and taken by fraud:

COUNT	DATE	DESCRIPTION	VALUE
1	7/15/96	41,471.90 LBS. (24 pallets) of 48 gauge, 25" polyester film	$62,207
2	8/5/96	19,467 lbs. of 48 gauge, 22" polyester film	$30,174
3	9/2/96	20,523 lbs of 92 gauge, mixed widths polyester film	$31,811
4	9/19/96	13,091 lbs of 92 gauge, mixed widths polyester film	$20,291

All in violation of Title 18, United States Code, Section 2314.

A TRUE BILL

/s/_____
FOREPERSON OF THE GRAND JURY

/s/_____
Assistant United States Attorney

DISTRICT OF MASSACHUETTS July 8, 1997, at 3:23 p.m. Returned into the District Court by the Grand Jurors and filed.

/s/_____
Deputy Clerk

APPENDIX J

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I—CRIMES
CHAPTER 1—GENERAL PROVISIONS

Current through P.L. 106-55, approved 8-17-99

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I—CRIMES
CHAPTER 113-STOLEN PROPERTY

Current through P.L. 106-55, approved 8-17-99

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or

money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof--

Shall be fined under this title or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by

any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 81—SUPREME COURT

Current through P.O. 106-55, approved 8-17-99

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment of decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.